STRIKING THE BALANCE

The Right to Know & the Right to Privacy

The Freedom
of Information
Review Committee

Volume 1: Report • July 2001

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The Right to Know & the Right to Privacy

The Freedom of Information Review Committee

Volume 1: Report

St. John's, Newfoundland, July 2001

Volume 1 of the Report of the Freedom of Information Review Committee contains the Committee's findings and recommendations. Written submissions received by the Committee are contained in Volume 2.

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The Queen's Printer
Confederation Building
P.O. Box 8700
St. John's, Newfoundland
Canada, A1B 4J6

Phone: (709) 729-3649
Fax: (709) 729-1900
E-mail: queensprinter@gov.nf.ca

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Freedom of Information Review Committee
Province of Newfoundland and Labrador

Honourable Kelvin L. Parsons, Q.C.
Minister of Justice and Attorney General
Government of Newfoundland and Labrador

Dear Minister,

We are pleased to present the Report of the Freedom of Information Review Committee.

In appointing the Committee, Government acknowledged that, while the Act was initially considered a pioneering piece of legislation, there have been no major changes to the legislation since its enactment in 1981.

The Committee, therefore, viewed its work as an opportunity to examine possibilities to modernize access to government information in a way that promotes a balance among the public's right to know, respect for individual privacy, and the full and frank discussion needed for effective policy-making.

In fulfilling our mandate, we have reviewed similar legislation in other provinces and the Federal Government, gathered information, consulted with individuals and organizations in the province and other jurisdictions, accepted written submissions and conducted a series of public hearings across the province. We are grateful to those upon whose wisdom, thoughtfulness and expertise we have drawn.

2nd Floor, Beothuck Building, 20 Crosbie Place, St. John's, NF, Canada, A1B 3Y8
Tel: (709)729-1622 Fax: (709)729-0478 E-mail: foirc@mail.gov.nf.ca

We commend this Report to you for your immediate attention and trust that it will assist Government in fulfilling its commitment to provide an open, transparent process for the development and implementation of public policy.

Respectfully Submitted,

Joan Dawe
Joan Dawe, Chairperson

Dennis M. Browne
Dennis Browne, Q.C.

Siobhan Coady

Leonard Williams
Dr. Leonard Williams

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Acknowledgements

The Freedom of Information Review Committee has drawn upon the experience and insights of many in preparing this Report.

The literature review, public consultation process, written submissions, as well as the formal and informal discussions with many individuals, assisted the Committee in formulating the conclusions and recommendations set out in this Report.

A task such as this could not have been completed without the efforts of competent, devoted staff. During the course of this comprehensive review, the Committee had the support of Dr. Melvin Regular, Executive Director; Stephen Ring, legal researcher; and Lynne Comeau, administrative assistant.

The Committee is also grateful for the competent editorial assistance provided by Robert Pitt in the completion of this Report.

The Freedom of Information Review Committee

Chairperson

Joan Dawe

Committee Members

Dennis Browne, Q.C.
Siobhan Coady
Dr. Leonard Williams

Executive Director

Dr. Melvin Regular

Legal Researcher

Stephen Ring

Administrative Assistant

Lynne Comeau

Editorial Advisor

Robert Pitt

"The Innu Nation recognizes that the rights of access to information must be balanced against the rights of personal privacy and the needs of agencies, organizations to protect personal, political, economically and culturally sensitive information. This is a balancing act, and we recognize the difficulties inherent in the exercise.

We believe that the best approach to resolving these difficulties is a commitment, in the Act, to openness and transparency in government, with specified exemptions for certain classes of information that are recognized as valid and reasonable limits on access to information."

- Submission of the Innu Nation

Summary

On December 12, 2000, the Government of Newfoundland and Labrador established the Freedom of Information Review Committee with a broad mandate to "review and make recommendations on all aspects of the *Freedom of Information Act*." This was the first review of the province's freedom of information legislation since it was enacted in 1981.

To carry out its mandate, the Committee undertook a comprehensive review of relevant literature, examined freedom of information legislation from other provinces and the federal government, and conducted a series of consultations across the province and with representatives of other Canadian jurisdictions.

Throughout its consultations and research, several common themes emerged which provided the foundation for the Committee's principles and shaped its recommendations. In particular, the Committee was guided by the principles of access, protection of privacy and essential confidences, inclusion, clarity, accountability and the right to an independent review. The Committee's overriding objectives have been to give greater control of the legislation to the people, and to foster the concept of "open government" through its recommendations.

To address these and related issues, the Freedom of Information Review Committee has proposed a number of changes, summarized below. However, as new legislation is prepared, all aspects of the current Act should be reviewed in light of the Committee's principles and recommendations.

Purpose: The Committee has concluded that the existing Act should be repealed and new legislation enacted 1. to provide specific rights of access to information, 2. to protect personal privacy, 3. to ensure access to one's personal information, and 4. to establish an independent process for reviewing decisions made by departments and agencies under the Act.

The Committee's other recommendations advocate both general and specific changes and additions, to give effect to this purpose.

Application and Coverage: The purpose of the Act is to ensure that all government departments and agencies are included. To ensure wide application and greater certainty about the agencies under the Act's jurisdiction, the Committee recommends the development of criteria for inclusion.

For a clearer understanding of the forms of material to be covered by the Act, a definition is required that includes new forms of electronic records.

The Committee also recommends removing the Newfoundland and Labrador residency requirement.

Protection of Privacy: In accordance with legislation in other Canadian jurisdictions and the advice received during consultations, the Committee advocates that a comprehensive regime for the protection of personal information and individual privacy be incorporated within the province's freedom of information legislation.

The Committee recommends that the Canadian Standards Association's International Model Code for the Protection of Personal Information, and the Newfoundland and Labrador Centre for Health Information's Privacy, Confidentiality and Access Standards, be considered as the foundation for this aspect of the new Newfoundland and Labrador legislation.

In order to protect and regulate the collection and control of personal health information, and to extend this protection to information held by private-sector agencies, separate health information legislation should be enacted to apply to all health organizations.

Confidences and Exceptions: The Committee recognizes that certain exceptions to disclosure are required to preserve confidences which are necessary for government to conduct its business effectively and in the best interests of all citizens. In general, the Committee has urged greater clarity to guide departments and agencies in applying exceptions of any kind.

In this regard, factual and background materials provided to Cabinet should be accessible under the Act, and there should be time limits for the disclosure of Cabinet documents.

The Committee advocates similar confidence and disclosure provisions for public servants or persons employed by agencies (including municipalities, school boards and health boards) when they are formulating or providing advice to decision-makers. Related recommendations deal with the appropriate disclosure of documents which are due to be published and confidentiality requirements contained in other statutes.

Finally, a public-interest override provision should be included which would require government and agencies to release records that would otherwise be excepted, if there is an overriding need for the public to have that information.

The Information Request and Privacy Complaint Process. The Committee recognizes the need for consistent application of the legislation throughout government, and improved departmental procedures for responding to information requests and privacy matters. A lead department should be designated to oversee and coordinate the administration of the Act and to ensure that personnel within departments and agencies have the education and training they need to interpret and apply the Act correctly.

The Committee has also identified specific departmental and agency responsibilities, including the designation of personnel, to support and rationalize the process. Other specific recommendations relate to the format of requests, time limits, fees, providing the reasons for a refusal, and specific exceptions to disclosure.

There is a further requirement for the Records Management Unit of the Provincial Archives to work with all departments and agencies to ensure the development and application of system-wide records-management policies, standards and procedures to support the requirements of the freedom of information and protection of privacy process.

***Review Mechanism*:** At present, the only option for a person who disagrees with a freedom of information decision is to launch an appeal to the Trial Division of the Newfoundland Supreme Court. Problems associated with using this process - particularly the costs and the length of time required - were frequently raised during the public consultations.

The Committee believes that the Newfoundland and Labrador legislation should provide an alternative to the courts, and recommends the establishment of the office of Information and Privacy Commissioner, with the authority to investigate and mediate complaints, and to make recommendations. In addition, the Commissioner should have the discretion to take a denied request to court at public expense.

The Committee recommends additional responsibilities for the Commissioner related to public education, to promote awareness of rights and protections under the proposed legislation.

To ensure independence, the Commissioner should be appointed by the House of Assembly and answerable only to that body, and should be provided security of tenure.

Government may also wish to consider whether the roles of the Commissioner and the office of Citizens' Representative, established by the recent *Citizens' Representative Act*, might complement each other or be combined.

***Monitoring and Reporting*:** Monitoring and reporting are essential to ensure that the intent of the Freedom of Information and Protection of Privacy legislation is achieved and maintained, and to identify problems as they arise.

To facilitate effective monitoring, and to help identify and resolve problems within departments or agencies, the Committee recommends that all provincial departments, and other agencies under the Act's jurisdiction, collect and maintain statistics related to access and privacy requests, and prepare annual reports. The Information and Privacy Commissioner should receive these departmental summaries and report annually to the legislature on both departmental compliance and the review process.

***Review of the Act*:** The present Newfoundland and Labrador *Freedom of Information Act* has remained virtually unchanged for two decades. During that time, there have been many changes in technology and society which have not been addressed in the legislation. To ensure that the new legislation remains current and relevant, the Committee recommends that a comprehensive review of the new Act be undertaken five years following its implementation, and periodically thereafter.

***Conclusion*:** The changes proposed are significant, and the legislative drafting process will require sufficient time. Even after the legislation has been proclaimed, some of the recommendations - particularly those related to education, records management and the inclusion of municipalities - will take time to implement fully. This will require a phased approach. The Committee advises the establishment of an implementation timetable and an appropriate monitoring regime as the new legislation is introduced.

Foreword

Newfoundland and Labrador's freedom of information legislation was among the earliest enacted in Canada. At the time it became law in 1981, it provided greater rights to Newfoundland and Labrador citizens than were enjoyed by most other Canadians. Since that time, the other provinces and the federal government have all passed freedom of information legislation, many have updated their Acts, and several have extended them to include protection of privacy.

When the Committee began its review of legislation in other Canadian jurisdictions, it became clear that, in several important respects, the present Newfoundland and Labrador *Freedom of Information Act* does not provide rights that have now become the standard in this country.

These include rights to

1. information held by all government departments and agencies, with limited exceptions for preserving essential confidences and protecting privacy.
2. protection of individual privacy and the control of personal information entrusted to government departments and agencies.
3. an effective and efficient process for accessing information and protecting privacy.
4. an independent review of decisions about information requests and privacy complaints.
5. education about entitlements and responsibilities under freedom of information and privacy legislation.

The Committee's research and public consultations confirmed this standard, and posed additional challenges to be considered as the Committee formulated its recommendations.

The Freedom of Information Review Committee has endeavoured to reach this standard and to meet these challenges in the form of new Freedom of Information and Protection of Privacy legislation.

1. Context for Change

> *"Government has no intention of hiding behind legislation. We are committed to an open, transparent process in the development and implementation of public policy, and we want to ensure our legislation remains clear and relevant in this new age of information.*
>
> *We understand that there must be a balance between the public's right to know, and respect for individual privacy. It is also important to promote full and frank discussions at the executive and ministerial level, which require appropriate recognition of the confidentiality of certain deliberations."*
>
> - Minister of Justice Kelvin Parsons

In the Ministerial Statement to the House of Assembly establishing the Freedom of Information Review Committee and providing its terms of reference, Justice Minister Kelvin Parsons asserted that government is "committed to an open, transparent process in the development and implementation of public policy" and wants to ensure that legislation "remains clear and relevant in this new age of information."

The Justice Minister also noted that "there must be a balance between the public's right to know, and respect for individual privacy. It is also important to promote full and frank discussions at the executive and ministerial level, which require appropriate recognition of the confidentiality of certain deliberations."

The Freedom of Information Review Committee heard similar comments during the course of its consultations across the province and in discussions with authorities in other parts of Canada. The Committee's research and review of other Canadian legislation also returned to the same key elements: the public's right to know; openness and transparency; clarity and relevance; appropriate recognition of confidentiality; respect for individual privacy; an independent review mechanism; and the need to address changes in information and records management.

This Report describes the steps the Committee took to achieve its mandate and address these issues, the results of its investigations, and the recommendations it believes will accomplish its purpose.

1.1 Mandate

The creation of the Freedom of Information Review Committee was announced by the Newfoundland and Labrador Minister of Justice on 12 December 2000. The Committee was mandated to review and make recommendations on all aspects of the *Freedom of Information Act* and regulations, including, but not limited to, recommendations dealing with

(i) the need for a new review mechanism to examine decisions respecting the disclosure of information;

(ii) the composition and powers of any recommended review mechanism;

(iii) the appropriate exemptions from disclosure of the act;

(iv) amendments necessary to deal properly with new forms of information such as e-mail; and

(v) appropriate time periods for government departments and agencies to respond to requests for information.

The Committee was given the authority to determine the best process for conducting its review.

1.2 Consultations and Research

To fulfil its mandate, the Freedom of Information Review Committee completed a comprehensive review of the relevant literature, examined freedom of information legislation from other provinces and the federal government, and conducted a series of consultations across the province and with representatives of other Canadian jurisdictions.

The literature reviewed by the Committee is from a variety of sources, including academic studies, media reports and law journals. In particular, the Committee found the reports of provincial and federal information and privacy commissioners to be informative and relevant, since they address issues on a practical level.[1]

The consultation process consisted of a series of public hearings in Newfoundland and Labrador; direct consultations with provincial and federal information and privacy commissioners; meetings with community stakeholders, municipal and provincial governments, and representatives of all parties in the House of Assembly; and an invitation for written submissions and comments from all interested groups or individuals.[2]

1.3 Historical Context

On June 16, 1981 Newfoundland and Labrador's *Freedom of Information Act* became law. Both government and opposition members of the Assembly noted at the time that this legislation created an important right for the people of the province. It established a statutory regime for citizens to access information in the records of government departments and scheduled agencies, subject to limited exceptions. By this Act, citizens of the province gained the opportunity for informed participation in the democratic process and the assurance of greater accountability on the part of government.

The Act also provided the right to appeal decisions to the provincial Ombudsman or to the Trial Division of the province's Supreme Court. However, in 1991, the position of Ombudsman was abolished, which left the courts as the only venue for appeals.

At the time the Newfoundland and Labrador *Freedom of Information Act* was passed, many other jurisdictions were contemplating extending the right to access information held by public institutions to their citizens, but few had done so. In Canada, only two other provinces - Nova Scotia (1977) and New Brunswick (1978) - had adopted similar legislation by the time Newfoundland and Labrador enacted its own. It was not until 2001 that all provinces had enacted freedom of information legislation.

The first federal *Access to Information Act* was proclaimed on July 1, 1983.

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[1] Appendix 5 contains a bibliography of relevant studies and reports, and legislation in other jurisdictions.

[2] Appendix 4 enumerates the Committee's consultations and meetings, and provides examples of the public invitations to participate in the review process.

1.4 Current Practices

Under the Federal *Access to Information Act*, citizens are entitled to request access to records held by the Government of Canada. This Act also establishes the office of information commissioner to investigate complaints from people who believe they have been denied rights under the Act. If refused, the applicant may appeal the decision to the federal court.

Similar rights and coverage are provided today in the freedom of information legislation of most provinces and territories. These various Acts define the departments and agencies to which they apply, and specify exceptions designed to protect privacy and essential confidences. Most legislation also provides for an override to these exceptions, if the release of the information is essential to the public interest.[3]

Government at the municipal level is included within the freedom of information provisions of most provinces. At present, only Newfoundland and Labrador,[4] Prince Edward Island and New Brunswick do not include municipalities. Ontario and Saskatchewan have separate access legislation for municipal or local governance.

In all provinces but Newfoundland and Labrador, the relevant legislation establishes a commissioner, review officer or ombudsman to assist with, or resolve, complaints about decisions made under the Act. In most provinces, an appeal to the courts is also allowed.

In Canada today, most freedom of information and privacy laws are integrated within a single Act: only the federal government and New Brunswick have separate freedom of information and privacy legislation. The privacy provisions typically serve to protect recorded information about an identifiable individual. This includes such information as a person's name, ethnic identity, political beliefs, and fingerprints. In general, privacy legislation reflects a set of basic principles known as "fair information practices" which set guidelines for the collection, use and release of personal information.

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[3] Appendix 3 to this Report provides, in tabular form, a comparison of various features of current freedom of information and protection of privacy legislation in Canada.

[4] In Newfoundland and Labrador, provisions of the *Municipalities Act* require disclosure of certain documents. However, unlike the *Freedom of Information Act*, it does not give a citizen the right to access all municipal information, subject to limited exceptions.

2. Priorities and Principles

> *"Whereas, previously a citizen had to justify a request for information in government hands, this bill requires government to justify any refusal to provide such information... . We want to create a 'culture of openness' within government so that public information is routinely released. If we are successful, the public will not even need to use the legislation."*
>
> - British Columbia Attorney General Colin Gabelman. 1992[5]

2.1 Priorities

Right of Access. In 1822, American President James Madison asserted the importance of information within a democracy: "Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."[6] The Ontario Assistant Information and Privacy Commissioner, citing a Supreme Court decision by Justice LaForest concerning the federal *Access to Information Act*, writes:

> "The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.
>
> Parliament and the public cannot hope to call the government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view. Access laws operated on the premise that politically relevant information should be distributed as widely as possible.

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[5] Cited in R. Botterell, 1995.

[6] Cited in D. Loukidelis, 2000.

> Rights to state-held information are designed to improve the workings of government: to make it more effective, responsive and accountable."[7]

Public presentations and written submissions to the Freedom of Information Review Committee identified similar priorities and expressed forceful support for the right to access information held by government departments and agencies.[8] They noted that the politicians - who govern only by the peoples' consent - are the custodians of the information in their care, and not its owners: the owners are the citizens of this province.

Appropriate Exceptions. While there is a strong consensus about citizens' rights to access information, there is also a clear recognition in legislation and the literature that there are legitimate exceptions to these rights. Alasdair Roberts[9] of Queen's University observed that no government recognizes an unqualified right to inspect information within public institutions. He noted further that limited and specific exemptions can be in the broader public interest.

Similar views were expressed to the Committee during the consultations. The presenter for the Innu Nation, for example, stated:

> "The Innu Nation recognizes that the rights of access to information must be balanced against the rights of personal privacy and the needs of agencies, organizations to protect personal, political, economically and culturally sensitive information. This is a balancing act, and we recognize the difficulties inherent in the exercise.
>
> We believe that the best approach to resolving these difficulties is a commitment, in the Act, to openness and transparency in government, with specified exemptions for certain classes of information that are recognized as valid and reasonable limits on access to information."[10]

Protecting Privacy. In addition to the right to access information held by government and other public agencies, many citizens who spoke to the Committee requested better safeguards to protect privacy and control access to their personal records. Most called for the incorporation of privacy protection within the freedom of information regime.

---

[7] T. Mitchinson, 2000, referencing Dagg *v.* Canada (Minister of Finance) 1997.

[8] In this Report, "department" means a department of the provincial government, and "agency" includes any board, commission, institution or other public body or entity, which is not a government department, to which the freedom of information legislation may apply.

[9] A. Roberts, 1999c.

[10] The full text of this presentation is in Volume 2 of this Report.

The privacy of personal information, the Committee was told, is increasingly under siege because of new information technologies, and the ease with which computers can assemble and retrieve data about individuals. Some presenters were concerned about protecting health information, and about ensuring the right to access and to correct personal records held by government departments and other agencies.

Canada's Privacy Commissioner, George Radwanski, writes that "there is no freedom without privacy. In fact, ...privacy is the right from which all others flow, freedom of speech, freedom of association, freedom of choice, and any freedom you can name."[11] Justice LaForest also speaks to the issue, observing that "It has long been recognized that this freedom not to be compelled to share our confidence with others is the very hallmark of a free society."[12]

Process. In discussions with the Committee, Ontario's Information and Privacy Commissioner, Dr. Ann Cavoukian, confirmed the importance of the *process* for ensuring access rights. She spoke of the need for an efficient and well-publicized mechanism for receiving and responding to requests. She stressed the importance of competent and experienced personnel to coordinate this work in each department and agency.

The Information Commissioner for Canada, discussing the culture of large bureaucracies such as the federal government, noted that several factors often work against openness, including a long history of confidentiality in decision-making, and the tendency of public servants to show deference to superiors, not wanting to object to a refusal, even when the information could have been released.[13]

Presenters also reminded the Committee of the possible pressures on those responsible for administering the Act, especially if the information is to be disclosed at a politically inopportune time. They advised that a central government agency should be charged with the responsibility of coordinating and championing the implementation of the Act across government departments and agencies, providing education, encouragement and support.

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[11] G. Radwanski, 2001.

[12] Cited by B. Phillips, 2000.

[13] J. Reid, 2001.

Records Management. During the consultations, the Committee heard concerns about the adequacy of the records management systems in government departments and agencies. Presenters noted that good records management is essential, since even the most open access legislation will be frustrated if the information cannot be found.

Review Mechanism. A further priority - required to give effect to the other elements - is an approachable and efficient independent review mechanism. Rights, the Committee was told, are of little consequence without the means to enforce them.

The present Newfoundland and Labrador *Freedom of Information Act* allows appeals only to the Trial Division of the Newfoundland Supreme Court. Problems associated with using this process - particularly the costs and the length of time required - were frequently raised during the public consultations. Without an accessible alternative to the courts, any freedom of information and protection of privacy legislation will be ineffectual and have no real force.

Education. Knowledge about rights is an essential prerequisite to enfranchisement. Presenters to the Committee emphasized the need to inform the public about their rights and how to use them. They stressed, as well, the need for education programs aimed at government and agency personnel. They underscored the need for a "cultural shift" towards more open, accountable and responsive government, and argued that education and training related to new access and privacy legislation is a necessary catalyst for such reform.

According to the 1987 Standing Committee on the Federal *Access to Information Act*, the most basic reason for providing education is that "Most people remain unaware of the Act. Many users, as well as those providing services under the Act, do not understand the purpose of the legislation, the need for access rights to be balanced with the respect for privacy and the needs of third parties and the government."[14]

Uniform Rights. The Committee's examination of other freedom of information legislation has indicated that Newfoundland and Labrador's current Act is out of date and lacks provisions that are now common and accepted components of such legislation. At the very least, the Committee believes, the rights of the citizens of this province should be equivalent to those enjoyed by other Canadians.

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[14] Canada, Standing Committee on the Review of the *Access to Information Act* and the *Privacy Act*, 1987.

2.2 Principles

The common themes and priorities that emerged from the consultations and research provided a foundation for the Committee's principles and shaped its recommendations. In particular, striking the appropriate "balance" between access and exceptions, between the right to know and the right to privacy, became a central focus of the Committee's work.

The following represent the underlying principles upon which the Committee has based its advice to government. It should be noted that these are not the Committee's principles alone. They are the principles articulated by the people of this province and other Canadians who have considered the issues and shared their thoughts:

1. *The public has a right of access to information and protection of privacy.*
2. *Freedom of information and protection of privacy regimes should be integrated within a single Act.*
3. *Privacy provisions of the Act should ensure that individuals have the right to access their own personal information and to have it protected from inappropriate use.*
4. *All agencies should be held to the same standard of accountability as government departments and be subject to the Act.*
5. *The criteria for including agencies should be defined within the legislation.*
6. *Government and agencies should provide ready and open access to records under their control, with limited, specific and clear exceptions to preserve privacy and essential confidences.*
7. *There should be consistent and coordinated application of the legislation among departments and agencies.*
8. *An independent review mechanism is required to review complaints, assist citizens and serve as an efficient alternative to the courts.*
9. *The request and the review processes should be simple and efficient to ensure timely responses and resolution of complaints.*
10. *Up-to-date and consistent records management is essential to ensure that records are retained and can be retrieved when required.*

11. Both the public and the public service should be well informed about the principles and application of the Act.

12. The legislation should be monitored and reviewed to ensure that it is implemented effectively, and remains relevant and true to its original spirit and intent.

3. Findings and Recommendations

> *"... access rights are not absolute. They are subject to specific and limited exemptions, balancing freedom of information against individual privacy, commercial confidentiality, national security and the frank communications needed for effective policy-making."*
>
> - Hon. John M. Reid, Information Commissioner of Canada[15]

This chapter presents the Freedom of Information Review Committee's findings and recommended changes to Newfoundland and Labrador's *Freedom of Information Act*.

Some of these recommendations deal with the issues specifically referenced in the Committee's mandate from government. Many address concerns raised by participants during the public consultation process. Others involve matters that arose from the Committee's research, and review of other freedom of information legislation across Canada.

Several of the Committee's recommendations will require significant changes in the way government deals with information and how it treats the information request process. Others will entail adjustments to provisions within the existing legislation.

Whatever the subject matter or implications, all of the recommendations which follow have been proposed in light of the Committee's principles articulated in Chapter 2, and its fundamental belief that an effective freedom of information process must enhance and expedite public access to information, while ensuring that individual privacy and confidentiality are protected.

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[15] J. Reid, 1999.

3.1 Purpose of the Act

The purpose of Newfoundland and Labrador's current *Freedom of Information Act* (1981) is

> "... to provide a right of access by the public to information in records of departments and to subject that right only to specific and limited exceptions necessary for the operation of the departments and for the protection of personal privacy" (Section 3).

Written submissions and public presentations to the Committee spoke of the need to expand the purpose and scope of the present Act. In particular, presenters called for legislation that provides broader access to information, streamlines the access process, clarifies issues of inclusion and exclusion, and incorporates an independent review process.

Many submissions also advocated the introduction of a regime to protect personal information held by the government. Several urged that freedom of information and protection of privacy be integrated within a single Act, as is the case in most provinces.

Although Newfoundland and Labrador's *Privacy Act* (1990) provides Newfoundland and Labrador residents civil protection against violations of their territorial and personal privacy, it does not protect against disclosure of personal information held by the government. Today, Newfoundland and Labrador is the only Canadian province that does not have a legislated protection regime for personal information held by government.

Most jurisdictions incorporate both freedom of information and protection of privacy within the same legislation. Ontario's *Freedom of Access and Protection of Privacy Act*, for example, aims

> "(a) to provide a right of access to information under the control of institutions in accordance with the principles that,
> (i) information should be available to the public,
> (ii) necessary exemptions from the right of access should be limited and specific, and
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information."

The Committee agrees that the concepts of freedom of information and protection of privacy are inextricably linked, and that this close connection should be reflected in common legislation.

Based on the Committee's review of relevant legislation, its research and consultations, it recommends the following:

Recommendation:

1. **That the current Act be repealed and new legislation enacted, which includes**
    a. **a right of access to the information within the control of all departments and agencies, with limited and specific exceptions to preserve privacy and essential confidences;**
    b. **protection of personal information, including its collection, use and disclosure by departments and agencies;**
    c. **a right of access by individuals to their own personal information held by departments or agencies; and**
    d. **an independent review process for decisions made by departments and agencies under the Act.**

3.2 Application and Coverage

Application and coverage issues define the scope of the Act. These include the *departments and agencies* that should be subject to the freedom of information and protection of privacy legislation, the *type of materials* that may be accessed under the Act, and *who* is eligible to use the Act.

Departments and Agencies

Under the present Newfoundland and Labrador *Freedom of Information Act*, a person may request access to information in the records of any government department or of any board, commission or other body specifically listed in a Schedule to the Act (Section 2(a)).[16] The Schedule is published by the Lieutenant-Governor in Council and agencies may be added as the Lieutenant-Governor in Council orders (*Freedom of Information Act* Section 16(a)).

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[16] Throughout the current Act, the term *department* also includes the institutions listed in the Schedule. The Schedule is reproduced in Appendix 2 of this Report.

Agencies which are not specifically named on this list do not fall under the jurisdiction of the current Act.

During the consultations, many presenters stressed the need for broader application of the Act to include all public agencies. Some observed that the present Act does not list, in the Schedule, institutions which are usually understood to be part of the public governance system. The province's Auditor General, for example, observed that under present legislation, only 26 of the province's 144 Crown agencies and other agencies - just 18% - fall within the purview of the Act.

Presenters sought greater clarity about why some institutions are placed on the Schedule for inclusion, while others are not. Several asked for the formulation of a procedure to ensure that agencies are not inappropriately removed from the Schedule, and suggested that changes should only occur with the consent of the House of Assembly.

The Committee agrees that agencies should be held to the same standard of accountability as government departments, and therefore be under the Act's jurisdiction. The legislation should be founded on the assumption that all government departments and agencies are subject to the Act unless specifically excepted for good cause.

A clear definition should be included in the Act which will automatically encompass any newly-created body, without need for amending the legislation. The Committee also believes that a schedule of included agencies would be useful for greater clarity; the authority for removing an agency from the schedule should reside with the Legislature of the province.

Recommendation:

2. **That agencies covered by the new freedom of information and protection of privacy legislation be identified by a definition; a schedule of agencies should also be included within the Act, to provide greater certainty.**

3. **That the approval of the House of Assembly be required to remove any agency from the jurisdiction of the Act.**

4. **That, when the Legislature is not in session, the Lieutenant-Governor in Council may authorize the removal of an agency from the Act, subject to ratification by the House of Assembly at its next sitting.**

Specific Inclusions. The approach which the Committee has recommended is intended to ensure that the new Act applies to all public institutions, unless specifically excepted. However, the Committee wishes to address separately the status of three specific entities, because of the attention they received during the public consultations.

At present, Newfoundland and Labrador's *Freedom of Information Act* does not apply to municipalities, school boards or regional health and community service boards.[17] As Table 1 in Appendix 3 indicates, freedom of information Acts, in most Canadian jurisdictions, include these bodies.

The Committee heard differing opinions on these issues during the consultations. Some participants representing municipalities stated that municipal governments should be exempt from the Act, citing what they considered to be the adequacy of existing municipal legislation and the need for private discussion of sensitive issues during meetings. Some spokespeople were concerned that an increase in information requests would create an unmanageable administrative burden and result in increased personnel and infrastructure costs, particularly for smaller municipalities.

While some municipal representatives argued that their councils' operations were open and transparent, other presenters held different views. They stated that municipal councils often conduct their business in privileged meetings and bring decisions to public meetings only for ratification.

The Newfoundland and Labrador School Boards Association was concerned that the application of the Act to school boards would impose a considerable administrative burden and generate significant legal costs.

Most presenters, however, believed that municipalities, school boards and all health and community services boards should stand the same level of scrutiny as other levels of government or public agencies, and be equally accountable to the citizens of the province.

The Committee has concluded that the need for greater openness, transparency and accountability on the part of agencies mandated to serve the public and to spend public monies outweighs the arguments for exclusion. This view is supported by the majority of the submissions and by the trend, across Canada, to extend coverage to school boards, health boards and municipalities.

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[17] Although the Act has always included institutional health boards, the newly-formed Health and Community Services Boards have not been added to the Schedule.

At the same time, some protection is necessary for the advice and deliberations of these agencies, similar to that afforded advice from officials[18] These exceptions should be designed to protect essential confidences, while allowing appropriate access to information.

Recommendation:

5. **That municipalities, school boards, and all health and community services boards be subject to the provisions of freedom of information and protection of privacy legislation, with appropriate and specific exceptions.**

Forms of Information

The Committee was mandated to review and make recommendations on all aspects of the *Freedom of Information Act*, but the Terms of Reference also specified a number of areas for specific consideration, including "amendments necessary to deal properly with new forms of information such as e-mail."

The types of materials, or forms of information which may be disclosed under the existing Newfoundland and Labrador *Freedom of Information Act* are defined as "information in any form including information that is written, photographed, recorded or stored by other means and on file or in the possession or under the control of a department" (Section 2.c).

The trend in other Canadian jurisdictions has been to articulate a more detailed definition of information that includes new forms. Within the Ontario *Freedom of Information and Protection of Privacy Act*, records include

> "... any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof... ." (Section 2)

The Committee finds that a more detailed definition of information would provide greater certainty of coverage, easily encompass new media forms and simplify the Act's administration. The Act should recognize that a record is *stored information*, regardless of the medium on which it is recorded, and that new media and new technologies are to be included under the Act.

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[18] See Section 3.4 of this Report.

Recommendation:

6. **That the current definitions of *information* and *record* be broadened to include all recorded information, regardless of form or the medium on which it is recorded, with the aim of ensuring that new technologies are included as they enter into use.**

Residency Requirements

To use the province's current *Freedom of Information Act*, an applicant must be either a resident of Newfoundland and Labrador, or an incorporated entity carrying on business in the province. Newfoundland and Labrador's Act is the only Canadian law of its kind that imposes such restrictions. Most Canadian statutes grant every Canadian citizen the right to access government records, and any individual or corporate body can request information.

Removing the Newfoundland and Labrador residency requirement would eliminate an unreasonable barrier to accessing information. It would also bring Newfoundland and Labrador's Act in line with other jurisdictions in Canada.

Recommendation:

7. **That the Newfoundland and Labrador residency requirement be removed, and that access be provided to all Canadian citizens and Canadian corporations.**

3.3 Protecting Privacy

The protection of individual privacy was a central issue for many who spoke to the Committee or provided submissions. The Committee was told that the province's freedom of information legislation should be revised in conjunction with the introduction of full and comprehensive privacy legislation. Presenters asserted that people should have the right to access their own personal information - including health information - held by government and agencies, to ensure that it is accurate and up-to-date, and to have it protected against unauthorized use.

The current Newfoundland and Labrador *Freedom of Information Act* deals with access to information about identifiable individuals (Section 10, Personal Information). This part of the Act prohibits disclosure, under the Act, of such information as a person's address, race, religion, age or marital status. It also protects the personal opinions or views of an individual, and correspondence that is implicitly or explicitly private or confidential (10.1).

The Act lists certain instances where information about individuals may be made public (Section 10.2). These include, for example, information about a government employee relating to the individual's job, or information relating to a benefit conferred. It allows government to release information about a person's criminal record, if it is in the public interest to do so.

However, the current Act does not contain a comprehensive privacy regime which addresses the way in which public bodies collect, use and disclose personal information. As well, the Act does not address the rights of individuals to have access to their personal information and to have it corrected, if necessary.

The privacy provisions of most freedom of information Acts contain provisions similar to Canadian Standards Association's (CSA) International Model Code for the Protection of Personal Information, which has come to be recognized as a national standard.[19]

The Code's Principles address such issues as an organization's responsibility for the personal information under its control, the purposes for which the information may be used, consent requirements, access issues and means of ensuring accuracy of the information.

The Committee agrees that there is a need for a comprehensive regime for the protection of personal information and individual privacy to be incorporated within the province's freedom of information legislation. The benefits, flowing from privacy provisions integrated with freedom of information legislation, will include enhanced protection of personal privacy, a consistent approach to the collection, retention and disclosure of personal records, better management of personal information, and greater openness to individuals seeking their own personal information.

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[19] New Brunswick's Statutory Code of Practice attached to its *Protection of Personal Information Act* (2001), for instance, closely resembles CSA International Model Code. The full code can be found *via* the internet at http://www.csa.ca/standards/privacy/code .

Recommendation:

8. **That the regime to protect personal information within the new Act be based on the Canadian Standards Association's International Model Code for the Protection of Personal Information.**

Personal Health Information

The collection and control of personal health information was the subject of several representations made to the Committee, and it was clear that this is an important and sensitive matter.

Although public institutions will be subject to the legislation proposed by the Committee, the Act will not apply to health information collected by the private sector. A number of health services are now being delivered by private health agencies. Several presenters advocated a consistent policy for both the public and private sectors, respecting the treatment of personal health information.

The issues related to personal health information are often unique, and may give rise to conflicting perspectives. One view, for instance, holds that an individual's right to privacy is paramount and must take precedence over any competing demand for information. Another perspective would hold that the broader needs of society may sometimes outweigh that right to privacy. For example, the present health system depends on access to patient records for research, public health information and accountability.

The Committee believes that an appropriate balance must be struck between an individual's right to privacy and society's needs, and that this should be dealt with in legislation specifically designed for the purpose.

The Standards developed by the Newfoundland and Labrador Centre for Health Information,[20] which are based on the CSA's Model Code, provide an appropriate starting point for discussions on the development of health information legislation in this province.

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[20] The Standards are included in the Newfoundland and Labrador Centre for Health Information's submission, reproduced in Volume 2 of this Report.

Recommendation:

9. **That government enact separate health information legislation to apply to all health organizations; and until that time, personal health information remain subject to the jurisdiction of the proposed *Freedom of Information and Protection of Privacy Act*.**

Third-Party Information

The current *Freedom of Information Act* requires that a third party be notified of an intention to disclose information if it includes trade secrets or financial, commercial, scientific or technical information, the disclosure of which would harm the interests of the third party (Section 13). In these circumstances, the third party is given the opportunity to make representations to the head of the department or agency to explain why the requested record should not be disclosed. The third party is also given notice of the right to appeal any decision to disclose the information.

The Committee is of the opinion that the scope of the current third-party intervention section is too narrow and should be extended to situations where the disclosure of information may be an unreasonable invasion of a third party's personal privacy. This would be consistent with the Committee's recommendations related to the protection of privacy under the Act, and with similar legislation in other Canadian jurisdictions.

Recommendation:

10. **That third-party intervention be extended to situations where the disclosure of information may be an unreasonable invasion of a third party's personal privacy.**

3.4 Confidences and Exceptions

In addition to exceptions intended to protect privacy, certain exceptions are required to preserve confidences necessary for government to conduct its business effectively and in the best interests of all the citizens it represents.

As one public submission to the Committee stated, "the rights of access to information must be balanced against the rights of personal privacy and the needs of agencies, organizations to protect personal, political, economically and culturally sensitive information. ... the best approach to resolving these difficulties is a commitment, in the Act, to openness and transparency in government, with specified exemptions for certain classes of information that are recognized as valid and reasonable limits on access to information."

Other than certain personal information (discussed in Section 3.3 of this Report), the current Newfoundland and Labrador legislation describes two classes or categories of information exempted from disclosure under the Act. They are defined as "non-discretionary exceptions" (Section 9) and "discretionary exceptions" (Section 11).

The current Act describes in its list of *non-discretionary exceptions* the types of information and classes of documents which may not be disclosed. These include such information as records obtained in confidence from the Government of Canada or another province, matters discussed in Cabinet, including government policy, minutes of meetings and briefing materials, and information designated as confidential by another Act.

Discretionary exceptions from disclosure include such matters as information which could "reasonably be expected" to harm federal-provincial negotiations, could hinder law enforcement or investigations, affect the economic interests of the province, or indicate proposed legislation.

While the Committee recognizes that exceptions are necessary, the application of any exception must be considered in light of the fundamental principle of the public's right to access information collected or generated at public expense.

In general, Newfoundland and Labrador's freedom of information and protection of privacy legislation should provide greater clarity to guide departments and agencies in applying exceptions. In other jurisdictions, lists of exempt information are more comprehensive and specific than in the current Newfoundland and Labrador *Freedom of Information Act*.

A similar level of guidance is required within the Newfoundland and Labrador legislation so that both requesters and officials will have a clearer and better harmonized sense of what material is accessible.

For example, more guidance is needed when dealing with issues related to law enforcement, the economic interests of the province and commercial information. The Act should clarify the circumstances under which such information should be excepted from disclosure.

In addition to the general need for clarity, the Committee has identified several areas that require specific recommendations related to exceptions:

- Cabinet Confidences
- Advice from Officials
- Published Documents
- Confidentiality Requirements in Other Statutes
- Public-Interest Override.

Cabinet Confidences

Cabinet confidence exceptions protect documents that, if released, would reveal the substance of deliberations of the Executive Council. As specified in Section 9(1) of the current Act, these include such documents as proposals or recommendations prepared for submission to Cabinet, Cabinet agendas and minutes, briefings to ministers on issues before the Cabinet, and background analyses of problems or policy options submitted to Cabinet for their consideration before decisions are made.

Most jurisdictions in Canada with freedom of information legislation allow exceptions for Cabinet confidentiality. This is based on the concept that, at the Cabinet table, all ministers must be free to exchange frank views with their colleagues, and to have those views and exchanges protected. However, the current Newfoundland and Labrador *Freedom of Information Act* is the most sweeping, allowing no access except "where disclosure of the information is authorized by the Premier of the province" (Section 9(2)).

In other Canadian jurisdictions there are several circumstances where Cabinet confidentiality ceases to apply. These circumstances include (a) the release of Cabinet documents after a specified time has passed, (b) the release of background or factual information once a decision has been implemented, or after a specified number of years, if the document has not been made public; and (c) a "public-interest" override, where the release of protected material is in the public interest, such as protecting public safety.[21]

The issue of exceptions for Cabinet documents was the subject of much discussion and advice during the public consultations.

Some presenters were concerned that information is unnecessarily exempted from disclosure, simply because it has been attached to Cabinet submissions. Others believed that reports are sometimes deliberately framed to attract protection under the Cabinet Confidences section of the Act, to keep secret information that would otherwise be disclosed.

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[21] See Table 2, Appendix 3.

The Committee heard during its consultations that there is no justification for restricting factual information or background material that does not disclose the substance of Cabinet deliberations. The Committee was also told that an exception time limit should be established in legislation for releasing documents protected by Cabinet confidence, as is the norm in other Canadian jurisdictions (see Table 2, Appendix 3).

The Committee agrees that a distinction should be drawn between advice and factual background material, and that the latter should be made available to the public once the relevant decision has been implemented, or after a specified time. Provisions for Cabinet confidences should be reviewed and made more explicit, to ensure that information is not inappropriately kept from the public.

Although Cabinet confidences are integral to good and efficient governance, a confidentiality time limit is needed.

Such changes would bring Newfoundland and Labrador's Act in line with those of other jurisdictions, provide access to a wider range of records, discourage arbitrary non-disclosure, and increase public confidence in government.

Recommendation:

11. **That factual information, background material and documentation that does not disclose the substance of Cabinet deliberations be made available to the public once the relevant decision has been implemented, or five years from the date of submission if no decision has been made public by that time.**

12. **That Cabinet Confidence exceptions be subject to a maximum fifteen-year time limit.**

Advice from Officials

Currently, there is no provision in the Newfoundland and Labrador *Freedom of Information Act* to protect from disclosure documents that reveal the advice to government or other agencies provided by a public servant or a person employed by the agency.

The Committee believes that exceptions are sometimes necessary to ensure that persons acting in an official capacity (including those representing municipalities and school boards) are not hindered from giving advice candidly. These exceptions would include records of deliberations formulating that advice.

Such exceptions are needed to ensure effective governance, for reasons similar to those which justify Cabinet confidences. However, just as certain background information provided to Cabinet should not be restricted, the same must be true under provisions protecting advice from officials. This exception should apply to policy advice and minutes pertaining to decision-making, but not to factual information used in the process. For example, statistical surveys, public opinion polls and environmental impact statements should be subject to disclosure provisions under the Act.

These exceptions from disclosure would enhance the ability of officials to perform their work in the interests of the citizens of the province, and would bring Newfoundland and Labrador's legislation in line with legislation in other Canadian jurisdictions.

Recommendation:

13. **That the Act provide protection against disclosure of certain kinds of information which would reveal advice or recommendations of a public servant to government, or of other persons employed by agencies under the jurisdiction of the Act.**

14. **That similar disclosure provisions and time limits be applied to these materials as are recommended for Cabinet confidences.**

15. **That this exception not apply to factual information, including the results of statistical surveys, public opinion polls and environmental impact statements.**

Published Documents

The current Act states that applicants seeking information which has been published should be referred to the appropriate publication. Section 8(1)(c) provides that applicants requesting information which is intended for publication will be informed of that fact, and of the approximate date of publication.

However, nothing in the current legislation indicates when, in the future, the requested information must be published, if this exception is invoked. This creates a *de facto* exception from disclosure, providing an institution the ability to refuse a request if the information is to be published at any time in the future. To prevent this from happening, the Committee believes that this exception should apply only if the information will be published within 90 days of the date of the request.

The addition of a specific limitation would ensure that only published or soon to be published documents would be subject to the exception and prevent the clause from being abused. It would also help the administration of the Act since the head of a department would know when the exception applies.

Recommendation:

16. **That information due to be published be made available within 90 days of a request.**

Confidentiality Requirements in Other Statutes

At present, the Newfoundland and Labrador *Freedom of Information Act* is subordinate to any confidentiality provisions of other statutes. Section 9(1)(g), on non-discretionary exceptions, states that a person is not permitted access to information in records "that are, subject to an Act of the province, required to be kept confidential."

Most other jurisdictions in Canada take the opposite approach. In these jurisdictions, access legislation takes precedence over all other statutes, with such modifications as are necessary to preserve the confidentiality of information protected by other legislation. Alberta's *Freedom of Information and Protection of Privacy Act*, for instance, provides for the specific listing of sections of other acts which are to prevail over the information act.

Establishing a similar regime within the Newfoundland and Labrador legislation would provide for ease of administration and create certainty of interpretation. It would be necessary to refer to just one Act (the *Freedom of Information and Protection of Privacy Act*) to determine if a particular item could be disclosed. New legislation with provisions to override the Act would also receive more scrutiny.

Recommendation:

17. **That the province's freedom of information and protection of privacy legislation take precedence over all other Acts.**

18. **That the freedom of information and protection of privacy regulations contain a specific schedule of provisions in other statutes which restrict disclosure under the Act.**

Public-Interest Override

Situations arise where it is in the public interest to disclose information which would otherwise be protected by an exception from disclosure under the Act. Issues of public health, safety, and environmental protection, for instance, may arise where there is an overriding need for the public to have certain information.

Under these circumstances it seems clear that the public's right to be informed should outweigh Cabinet confidences and other exceptions, including an individual's right to privacy.

A public-interest override of disclosure exceptions is a common feature of access legislation. However, there is no such override in the present Newfoundland and Labrador *Freedom of Information Act*, except that under Section 9(2) the Premier may authorize disclosure of exempted information for reasons that are not specified.

The Committee has concluded that specific provisions for a public-interest override of exceptions should be an integral component of Newfoundland and Labrador's freedom of information and protection of privacy legislation.

Recommendation:

19. **That the Newfoundland and Labrador freedom of information and protection of privacy legislation provide for a public-interest override.**

3.5 The Information Request and Privacy Complaint Process

Applications under the present *Freedom of Information Act* are initially directed to the Minister of the government department, or to the head of the agency, which maintains the relevant documents. In most government departments, an individual is designated to respond to requests and complaints, and to report to the Minister about the status and availability of the requested information.

After an assessment has been completed within the department, access to the information is either granted or denied, and the applicant is notified of the decision in writing. If the request is denied, the applicant may appeal the decision by starting proceedings in the Trial Division of the Supreme Court of Newfoundland.[22]

During the consultations, presenters focused on two principal areas related to supporting and strengthening the current freedom of information process within government: the need for consistent application of the legislation throughout government, and improved departmental procedures for dealing with information requests and privacy issues.

Presenters noted that the current *Freedom of Information Act* does not provide for a central authority to guide and educate departments and other agencies about the Act's application. The Committee was also told that there is insufficient direction in the Act for administering the legislation at the departmental and agency level.

Consequently, within some departments and agencies, there is a lack of familiarity with proper response procedures, and interpretation of the Act varies from agency to agency.

The Committee believes that the public must be confident that appropriate and consistent decisions are made across all departments and agencies, in keeping with the intent of the Act.

In other jurisdictions, these concerns have been addressed by the designation of a lead department or agency to oversee the administration of the Act and by defining specific departmental responsibilities, including the designation of departmental coordinators.

The Lead Department

The Committee has concluded that a department or other entity within government should be assigned responsibility for the overall administration and coordination of the Act. This lead department should be mandated to support all other departments and agencies by providing leadership in interpreting and applying the Act, and fostering common standards and monitoring.

Specific responsibilities of the lead department should include

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[22] An alternative review process is addressed in Section 3.6.

- developing policy and procedures for the effective administration of the Act;
- providing on-going education, related to the Act, to the public service;
- providing advice to departmental officials responsible for requests; and
- communicating with the Information and Privacy Commissioner.[23]

The lead department will also need to work closely with the Records Management Unit of the Provincial Archives of Newfoundland and Labrador to ensure the development of system-wide records management policies, standards and procedures to support and complement the requirements of the freedom of information and protection of privacy process.

Recommendation:

20. That a lead department be mandated the responsibility to oversee and coordinate the administration of the Act throughout all government departments and other agencies under the Act's jurisdiction.

Departmental and Agency Responsibilities

The Committee believes that the Minister of each government department and the head of each agency under the jurisdiction of the Act, must have direct responsibility for its administration of the Act.

Within each department and agency, an individual with the appropriate education, training and skills should be designated with responsibility for responding to requests and maintaining departmental statistics related to them.

Recommendation:

21. That the Minister of each department, or head of each agency, be responsible for applying the Act within the department or agency.

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[23] The roles and responsibilities of the Information and Privacy Commissioner are described in Section 3.6 of this Report.

22. That each department or agency designate an individual to

   a. receive and process requests;

   b. coordinate responses for approval by the minister or head;

   c. ensure that the provisions of the Act are understood and implemented at the departmental level;

   d. maintain a registry of all requests; and

   e. prepare annual statistical reports on requests received.

Request Administration

The following recommendations are intended to provide guidance and greater clarity for several issues related to the conduct and administration of the request process at the departmental or agency level.

Format of Requests. At present, a request for information under the *Freedom of Information Act* must be made in writing. The Act does not address situations where a person is unable to comply with this requirement.

The Committee believes that the proposed freedom of information and protection of privacy legislation should permit an oral request if a person has a limited ability to make a written request. This option is now available in other Canadian jurisdictions.

Recommendation:

23. That a person who is unable to prepare a request in writing have the option to submit an oral request.

Time Limits for Initial Response. The Committee's Terms of Reference specifically mandated consideration of "appropriate time periods for government departments and agencies to respond to requests for information."

The present Newfoundland and Labrador *Freedom of Information Act* (Section 7) requires that, within 30 days of the receipt of a request, the Minister or head respond in writing to grant or deny the request, or to refer it to another department or agency which has the information. The current legislation does not specifically provide for extensions to the time limit for responses.

While a 30-day initial response time is common throughout Canada, in most other jurisdictions, this limit may be extended, for good reason, up to a maximum of another 30 days.

Grounds for an extension usually include one or more of the following reasons:

- the large number of records that have to be examined cannot be assessed within 30 days, without unreasonable interference with normal operations;
- the individual or organization has made a large number of requests at the same time;
- consultations are necessary before a response can be made, and they cannot reasonably be completed within 30 days;
- the request is not sufficiently detailed to enable the institution to identify the requested record.

Most Acts require that the applicant be informed of any time extension, and told when a response can be expected. Typically, the applicant also has the right to make a complaint, to an independent review officer, about the extension.

Recommendation:

24. That the legislation provide for a 30-day extension to the existing time limit for responses, and that criteria for extensions be specified in the Act.

25. That, when extensions are granted, the applicant be notified and provided with the reasons for the extension, the date it is expected the response will be issued, and information about the applicant's right to appeal the extension.

Fees. The fees currently charged under Newfoundland and Labrador *Freedom of Information Act* are $5.00 for the application fee, a $15.00 per hour service fee (after the initial two hours) and $0.25 per page for photocopying.

During the consultations, some presenters told the Committee that fees should be kept to a minimum - a nominal application fee and a photocopying fee aimed at cost-recovery. Others asked that all fees associated with a request be abolished, and argued that the fees collected add little to government revenues, while sometimes playing a significant role in deterring requests.

Fees charged in other jurisdictions that the Committee examined tend to be similar to, or higher than, Newfoundland and Labrador's. The application fee in Alberta, for instance is $25, though most are the same as in this province ($5.00). At $15.00 an hour, Newfoundland's service fees are the lowest, with $30.00 an hour being the typical fee charged in other provinces. The $0.25 per page fee charged in Newfoundland and Labrador is the amount charged in most other provinces.

The Committee is of the opinion that fees should be held to reasonable levels which do not act as a barrier to access. However, situations will arise where an applicant does not have the ability to pay for a request. In other jurisdictions, under such circumstances, the government institution involved can waive the applicable fees.

Use of the access legislation should not be restricted to those who have the ability to pay and provisions should be made to waive fees under appropriate circumstances.

Recommendation:

26. **That the fee structure be maintained at reasonable levels and a waiver policy be included in the legislation.**

Disclosure Injurious to Health or Welfare. Situations sometimes arise where disclosure of information may be reasonably expected to threaten the health or safety of the applicant or other person, or interfere with public safety. The Committee believes that, in such situations, departments and agencies should be able to refuse access to the requested information. This is common in other Canadian jurisdictions.

In order to refuse access to information about an applicant on these grounds, the department or agency would need to seek the opinion of a physician, a chartered psychologist, a psychiatrist or any other appropriate expert who would certify that disclosure could be expected to result in immediate and serious harm to the applicant or another person.

The addition of a right to refuse access where disclosure is injurious to health or welfare of an individual would provide added protection for individual health and safety.

Recommendation:

27. That an institution be able to refuse access to information where disclosure of the information could reasonably be expected to interfere with the health or safety of the applicant or any other individual.

Providing Reasons for Refusal. Under current legislation the responding department or agency is not required to provide the reason it has refused access. In all other Canadian freedom of information legislation, a notice of refusal must cite the section of the Act being relied upon to refuse the request, and provide information about the right to appeal the decision.

It is the Committee's opinion that reasons for refusal should be provided if access has been denied. This would encourage better-reasoned decisions and would enable an applicant to make an informed choice about appealing the decision. The release of the name and position of the person who can answer questions about a refusal would also encourage informal resolution of disputes, without resorting to a formal review or appeal.

Refusals should also inform applicants of their right to appeal the decision or have it reviewed by the Commissioner.

Recommendation:

28. That refusals specify
    a. the Section(s) of the Act being relied upon to refuse the request;
    b. the name of the person who can be contacted regarding the reply; and
    c. information about the applicant's right to appeal the decision to the court or have it reviewed by the Information and Privacy Commissioner.

Ability neither to Confirm nor Deny. Although the Committee recommends that reasons be provided for the denial of all information requests, there are some circumstances where providing the reasons for refusal, or even a statement that a requested record does not exist, is not an appropriate response to an applicant's request.

For example, a person may request information about police surveillance. This is clearly law enforcement information that should not be disclosed. If, in fact, the surveillance is being performed, it would be inappropriate to deny the existence of the information. On the other hand, a response that access to the information was denied based upon a law enforcement exception might imply that surveillance has occurred.

The Committee believes that granting a department or institution the ability to respond to a request by neither confirming nor denying the existence of the information should be an option within Newfoundland and Labrador's freedom of information and protection of privacy legislation, under special circumstances. These circumstances should only be considered where the confirmation or denial of information could be expected to interfere with personal privacy or law enforcement, or threaten the health or safety of an individual.

The addition of this provision provides government institutions the ability to respond to a request in a way that would preserve essential confidences and prevent harm. It would also bring Newfoundland and Labrador's legislation in line with that in other jurisdictions.

Recommendation:

29. **That agencies under the jurisdiction of the Act be allowed to respond to a requester by neither confirming nor denying the existence of information where the confirmation or denial could be expected to interfere with personal privacy, law enforcement or threaten the health or safety of an individual.**

Records Management

Proper records and information management are essential prerequisites for an effective freedom of information process. Without well-organized and readily accessible records, no freedom of information process will be open or accessible.

The Committee was told during its consultations that records management systems are inadequate within many departments and agencies, and this frequently hinders the identification and retrieval of information related to requests. The nature of records has changed drastically over the past decade, and information management practices have not kept pace. This results in delays and additional research time, which adds to the applicant's costs.

The Committee believes that records and information management must be improved and standardized, as a priority, throughout all government departments and agencies. Records management staff in departments and agencies should be provided with the necessary training to meet the challenges of modern records management, and to take full advantage of the new information management technologies available. This will require resources and a realistic strategy and time line for full implementation.

Recommendation:

30. **That government ensure the implementation of standards and procedures for the retention, organization, retrieval and disposal of paper, electronic and other records across all departments and agencies.**

31. **That government provide for adequate education, training and monitoring of staff responsible for implementing the standards across government, and for other resources necessary to establish an effective and efficient records management regime.**

3.6 Review Mechanism

The Terms of Reference require the Committee to "review and make recommendations regarding ... the need for a new review mechanism to examine decisions respecting the disclosure of information" and "the composition and powers of any recommended review mechanism."

At present, the only option under the *Freedom of Information Act*, for a person who wishes a decision reviewed, is to launch an appeal to the Trial Division of the Newfoundland Supreme Court. Indeed, the concern most frequently voiced to the Committee during the public consultations was the difficulty of using the appeal process under current legislation.

The Committee heard that the costs of a court appeal are high and very often prohibitive. Others noted that, by the time the court hears and decides on an appeal, the information may no longer be of use because of the time that has elapsed. In general, the Committee was told, the existing appeal process precludes any opportunity for the parties to reach an understanding or achieve a mutually acceptable resolution.

Consistently, presenters called for the creation of a review mechanism, independent of government, which provides an alternative to the courts, and an alternative to the adversarial approach.

The Committee agrees that the high costs, the time involved in a court appeal and the confrontational nature of the current process are significant limitations and deterrents. If the Newfoundland and Labrador *Freedom of Access and Protection of Privacy Act* is to be accessible to all citizens, the legislation must provide for a review process which is a practical and more efficient alternative to litigation.

The Committee believes that the best alternative is an independent Commissioner with the authority to assist citizens by investigating information refusals and privacy complaints.[24]

Recommendation:

32. **That the position of an independent Information and Privacy Commissioner be established under the *Freedom of Information and Protection of Privacy Act*.**

Appointment of the Commissioner

Throughout the consultations, the Committee was told that to ensure credibility and acceptance as an alternative to the courts, the Commissioner's appointment and tenure will have to be independent and clearly non-partisan, as is the case in other jurisdictions. The Committee agrees that the appointment of the Information and Privacy Commissioner must be free of political influence, and that the Commissioner should not be in a position to be swayed by any agency or interest group during his or her tenure.

To ensure independence, the Commissioner should be appointed by the House of Assembly and answerable only to that body. To ensure security of tenure, the appointment should be for a fixed period of seven years with an option for one additional term. In addition, the salary of the Commissioner should be tied to an appropriate salary scale that is independently set.

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[24] Within Canada, Newfoundland and Labrador is the only province without an independent commissioner or ombudsman to assist people with appeals under freedom of information legislation (see Table 3, Appendix 3). In 2001, the Newfoundland and Labrador legislature passed the *Citizens' Representative Act* (included in Appendix 2) which established the position of Citizens' Representative to investigate grievances about the actions of any government departments or agencies. Government may wish to consider whether the roles of the Commissioner and the Citizens' Representative might complement each other or be combined.

Recommendation:

33. That the appointment of the Information and Privacy Commissioner be made by the House of Assembly upon the recommendation of the Lieutenant-Governor in Council.

34. That the Information and Privacy Commissioner's term of office be seven years, with the possibility of renewal for one further term.

35. That the Information and Privacy Commissioner report to the House of Assembly.

36. That the Information and Privacy Commissioner's salary be tied to an external salary scale.

Powers

To function effectively, the Information and Privacy Commissioner must have certain special powers and authority. The Commissioner must have the power to investigate requests for review and complaints under the Act, and these powers should be specified in the legislation. To conduct an effective investigation, the Information and Privacy Commissioner must be able to examine the information in question to determine if disclosure has been appropriately denied, or if personal privacy is threatened. Without such power, the Commissioner will be unable to make well-informed and considered decisions.

This power of review should operate notwithstanding any law or privilege that may be claimed for the information in question, such as Cabinet confidences. The Commissioner should be able to examine any requested record within a reasonable period of time, so that the time limits can be met.

Recommendation:

37. That the Information and Privacy Commissioner have investigative powers and the right to examine, during an investigation, any record that is the subject of a review request or complaint.

The Review and Appeal Process

Under the review process proposed by the Committee, applicants whose requests for information have been refused, or who have a complaint related to the privacy provisions of the Act, would have the right to request that the Information and Privacy Commissioner investigate the matter.[25]

An investigation of an information refusal would involve an examination of the original information request, the information in question and the reasons for refusal. For a privacy complaint, the Commissioner would review how the department or agency was dealing with the information in question.

During the investigation, the Commissioner should also attempt to mediate between the parties in order to reach a mutually acceptable resolution. If a resolution was reached, the process would end with the withdrawal of the action by the applicant or complainant.

If mediation cannot resolve the issue, the Commissioner would prepare a written report and recommendation concerning the review request and submit it to the applicant and to the relevant department or agency. This report would either support the department or agency's decision, or support the original application or complaint, and recommend that the department or agency reverse its decision.

If the Commissioner's recommendation is not acted upon by the department or agency after a specified time, the Commissioner should have the right in legislation (with the original applicant's or complainant's permission) to appeal the decision to the Trial Division of the Supreme Court.

The court costs for the appeal would be borne by the Information and Privacy Commissioner's Office.

The Committee recognizes that not every review request or complaint will have merit. The information might not exist. It might be clearly exempt. The Committee therefore advocates a statutory discretion to allow the Commissioner to determine which requests, upon investigation, merit further review or the Commissioner's support in an appeal to the courts.

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[25] Some applicants may prefer to go to court without pursuing a mediated settlement through the Information and Privacy Commissioner; the Committee believes that this option should be preserved, though it would be at the applicant's expense.

If the Commissioner does not support an appeal to the Supreme Court, applicants or complainants would have the right to do so on their own behalf and at their own expense.

Recommendation:

38. That the Information and Privacy Commissioner have authority to mediate between the parties to seek a mutually acceptable resolution of the issue.

39. That, if mediation is unsuccessful, the Commissioner submit a report and recommendation to the applicant and the department concerning the review request or complaint.

40. That, where the recommendation of the Commissioner supports the review request or complaint and the department or agency does not comply, the Commissioner should have a discretion to appeal the department or agency's decision to the Supreme Court Trial Division with the Applicant's or Complainant's permission.

41. That the costs of appeals to court initiated by the Information and Privacy Commissioner be borne by the Office of the Information and Privacy Commissioner.

The following Table summarizes the process for information requests, reviews and appeals recommended by the Committee. Privacy complaints would follow a similar process.

Proposed Information Request, Review and Appeal Process

A. Information Request Application

1. Applicant submits request for information to Department or Agency

2. Department/Agency reviews request and decides on disclosure (time limit extension may be applied)

3. Applicant is informed in writing that
    - a. the requested information is to be provided, *or*
    - b. the information request is refused and reasons are provided

4. If refused, the Applicant may choose to
    - a. do nothing further,
    - b. have the refusal reviewed by the Commissioner, *or*
    - c. appeal the refusal directly to the Supreme Court, at own cost

B. Review by Commissioner

1. The Commissioner investigates, reviews information

2. The Commissioner may mediate between the Department/Agency and applicant to resolve the issue informally

3. The Commissioner submits a written report and recommendation to Applicant and Department/Agency head
    - a. to disclose information, *or*
    - b. that information should not be disclosed

If the Commissioner recommends disclosure, the Department or Agency may
- a. produce the information, *or*
- b. refuse to provide access

If the Commissioner recommends disclosure, and the Department or Agency refuses, the Commissioner may
- a. do nothing further *or*
- b. initiate an appeal to the Supreme Court on the Applicant's behalf

If the Commissioner recommends no disclosure, the Applicant may
- a. do nothing further, *or*
- b. appeal the refusal to the Supreme Court at own cost

C. Appeal to Supreme Court

1. Supreme Court Trial Division hears appeal of information request refusal and makes decision.

Time Limits

The limits recommended for the review and appeal process are designed to allow enough time to complete an adequate investigation and ensure timeliness.

Initiating a Review Request. At present, an applicant has 30 days to appeal, to the Supreme Court Trial Division, a decision to deny an access request. Under the new process recommended by the Committee, an applicant would have the right to have the matter reviewed first by the Information and Privacy Commissioner.

The Committee believes that the 30-day time limit is also appropriate for initiating a review by the Information and Privacy Commissioner.

If the applicant wishes to initiate an appeal to the court after a written response has been provided by the Information and Privacy Commissioner, the applicant should be allowed an additional 30 days to do so, from the date of the Commissioner's report.

Recommendation

42. **That the time limit for initiating a review by the Information and Privacy Commissioner be 30 days from the date of receiving the written response from the department or agency.**

43. **That the time limit for initiating an appeal to the Supreme Court Trial Division be 30 days from the date of receiving the written response from the department or agency, or 30 days from the date of receiving the written report of the Information and Privacy Commissioner, if the applicant has applied first to the Commissioner.**

Commissioner's Response. The time allowed to investigate a review request should be balanced with the applicant's right to receive a timely response. For this reason, the Committee believes that it is appropriate to require that the Commissioner respond in writing within 60 days of receiving the review request.

Recommendation:

44. **That the Information and Privacy Commissioner complete the investigation and file a report within 60 days of receiving the review request.**

Response to the Information and Privacy Commissioner. A time limit should be established within which the relevant department or other agency must respond once the Commissioner has made a recommendation. Based on the practice in other Canadian jurisdictions, a 15-day time limit is appropriate.

Recommendation:

45. **That the time limit for a department or other agency to respond to the recommendation of the Information and Privacy Commissioner be 15 days.**

Other Roles and Responsibilities

Public Education. Public education is an integral part of an effective freedom of information and protection of privacy regime and review process. As one presenter noted to the Committee, implementing a new or revised Act will require a public relations and education program aimed at the general public as well as education and training for the public service.

The Committee agrees that the public should be informed about their rights of access to information and privacy protection under the Act. Without knowledge of their rights, citizens will not be able to exercise them effectively.

In many jurisdictions, the information commissioner publishes brochures or establishes public web sites containing information on access, reviews and privacy, and is active in making public presentations concerning the legislation.

Recommendation:

46. **That the Information and Privacy Commissioner have the responsibility to provide education to the public about the Act.**

Liaison with Government and Agencies. Another important function of the Commissioner should be continuing communication with government departments and other agencies covered by the Act. Liaison should include discussions related to the Act's administration, advising government on public representations that the Commissioner has received, and reporting to the Legislature.[26]

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[26] The annual report to the legislature is described in Section 3.7 of this Report.

Recommendation:

47. That there be continuing liaison between the Information and Privacy Commissioner and government departments and other agencies concerning the administration of the Act.

Complaints about Extensions and Fees. Many jurisdictions permit an applicant to complain to the Information and Privacy Commissioner about extensions of time periods and about fees charged by government institutions, related to an information request or privacy issue. The Committee believes that allowing the Information and Privacy Commissioner to review extensions and the level of fees charged would help to rationalize the process and prevent misuse.

Recommendation:

48. That the Information and Privacy Commissioner be given the authority to receive and investigate complaints about time-limit extensions and the fees charged under the Act by departments or other agencies.

3.7 Monitoring and Reporting

Monitoring and reporting are necessary to ensure that the spirit and intent of the Freedom of Information and Protection of Privacy legislation is achieved and maintained.

Departmental Reporting

As noted in Section 3.5 of this Report, departments and agencies are not now obliged to maintain a record of the requests received under the *Freedom of Information Act*, and there is no requirement for a central registry of requests within government as a whole. Because there is no easy way to assess the number and fate of requests received under the current *Freedom of Information Act*, or to document the length of response times, it is difficult to monitor the Act so that appropriate adjustments can be made.

This difficulty was noted by several presenters during the consultations and a number of remedies were proposed, including the establishment of a central agency within government (discussed in Section 3.5) and the requirement of record keeping and reporting by all departments and agencies, detailing requests and responses under the Act.

The Committee believes that all provincial departments and other agencies under the Act's jurisdiction should collect and maintain statistics related to access and privacy requests. Collecting these statistics and reporting the results would encourage more timely compliance, and help to identify and resolve systemic problems within departments or agencies.

Recommendation:

49. **That all departments and other agencies under the Act be required to collect statistics related to information and privacy requests and to prepare annual reports on the administration of the Act. The reports should contain such statistical information as the number and type of requests received, access granted, refusals, fees and response times.**

Information and Privacy Commissioner's Report

As the independent agent mandated to oversee the appropriate application of the Act, the Information and Privacy Commissioner should have the authority to assess and report on compliance with the Act by the agencies it covers.

The reports compiled by each department and agency should be submitted to the Information and Privacy Commissioner, who in turn should report annually to the House of Assembly on both departmental compliance and the review process.

Commenting on the situation in Ontario, that province's Assistant Information and Privacy Commissioner stated:

> "Having public bodies report to us, and us in turn report to the Legislature, ... provided an opportunity for the Legislature to have the benefit of an evaluative assessment of the operation of the FOI system on an annual basis. We try our best to add value in this way, and I think we've been increasingly more effective over the course of the past few years."[27]

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[27] Correspondence with Freedom of Access Review Committee, June 2001.

Recommendation:

50. That all departments and other agencies covered by the Act be required to submit annual reports to the Information and Privacy Commissioner.

51. That the Information and Privacy Commissioner report annually to the House of Assembly summarizing

    a. the number and disposition of information requests and privacy complaints received by departments and other agencies under the jurisdiction of the Act;

    b. the commissioner's recommendations and whether departments and agencies have complied with them; and

    c. an assessment of the extent to which departments and agencies are complying with the Act.

3.8 Review of the Act

Except for the removal of provisions relating to an ombudsman, the Newfoundland and Labrador *Freedom of Information Act* has remained virtually unchanged since its enactment in 1981. Since that time, there have been many changes in technology and society which have not been addressed in the legislation.

The Committee believes that a comprehensive review of the new Act should be undertaken five years following its implementation. Following this initial review, there should be regular reviews to ensure that the legislation

- continues to reflect societal values;
- is able to accommodate technological changes;
- preserves its original spirit and intent; and
- remains efficient in administration.

Recommendation:

52. That a review of the legislation be conducted five years following the implementation of the new Act, and every five years thereafter.

4. Conclusion

> *"The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."*
>
> - Canadian *Access to Information Act*, Section 2.(1)

The objective of the Freedom of Information Review Committee's work has been to strengthen the statutory rights of citizens to access information held by government departments and agencies, and to ensure that privacy is protected.

The Committee has described this as a "balancing act" - attempting to strike, in its recommendations, a fair and effective equilibrium between the right to know and the right to privacy .

To accomplish its purpose, the Committee has advocated open government, which it believes can be achieved by adopting the assumption of a right of access limited only by specific and defined exceptions. Public representation also strongly endorsed enhanced access to information, but recognized that access must be subject to certain exemptions if Government decision-making is to be effective and efficient and privacy is to be preserved.

Education - about the legislation, and about the concepts of access and privacy rights - is a fundamental requirement of an open process and a government open to change.

The changes the Committee has proposed are significant and the legislative drafting process will require careful attention and adequate time. In addition to the specific changes recommended in this Report, all aspects of the Act will need to be reviewed in light of the Committee's principles and directions as new legislation is prepared.

Even after the new legislation has been proclaimed, some of the recommendations, particularly those related to records management, municipalities and education, will take time to implement fully. This will require a phased approach.

The Committee advises the establishment at the outset of an implementation timetable and a monitoring regime that will ensure the new legislation continues to belong to all the citizens of this province.

Appendices

1. Glossary of Terms

2. Newfoundland and Labrador Legislation

   Freedom of Information Act (1981)
   Privacy Act (1990)
   Citizens' Representative Act (2001)

3. Legislation (Comparison Tables)

4. Consultations

5. Bibliography and Sources

1. Glossary of Terms

Glossary

These definitions are drafted for the sole purpose of helping the reader understand this Report. They are not intended to be definitions incorporated into the new statute.

Agency: a person, board, commission, association, corporation or other body which is subject to the legislation.

Appeal: a proceeding undertaken to have a decision reconsidered.

Applicant: a person who makes a request for information held by a department or agency, or a person who is affected by a department or agency's release of that information. Synonymous with *requester.*

Application Fee: the amount required to be paid at the time a request is made.

Canadian Standards Association's International Model Code: the model code for the protection of personal privacy developed by the Canadian Standards Association, which has become recognized as a model standard. The reader may view this document on the internet at the following address: http://www.csa.ca/standards/privacy/code.

Complainant: the person who makes a complaint.

Coverage: the departments and agencies to which the Act applies, and the information that may be accessed by an applicant.

De Facto: actual; existing in fact; having effect even though not formally or legally recognized.

Discretionary Exception: information which may be disclosed at the discretion of a head.

Department: a department of the government of Newfoundland and Labrador.

Exception: information that does not have to be disclosed under the Act. *Exception* can be used synonymously with the word *exemption.*

Head: (i) in the case of a department of the government of the province, the minister responsible for the administration of the department; (ii) in the case of an agency, its head.

Information: documents held by government departments or agencies which are the subject matter of a request.

Information and Privacy Commissioner: the person appointed under the proposed legislation to review complaints about information request decisions and privacy matters.

Investigative Model / Approach: an approach or model in which the information commissioner investigates a complaint, and 1. recommends that certain action be taken to correct a denial of access or a violation of a privacy provision, or 2. confirms the decision of the department or agency.

Lead Department: the department charged with the administration of the Act. Its responsibilities include:

(a) developing policy and procedures for the effective administration of the Act;

(b) providing to the public service on-going education related to the Act;

(c) providing advice to departmental officials responsible for requests; and

(d) communicating with the Information and Privacy Commissioner.

The lead department is not a central clearing house for receiving requests.

Personal Health Information: includes information

(a) concerning the physical or mental health of an individual;

(b) concerning any health service provided to an individual;

(c) concerning the donation by an individual of any body part or any bodily substance;

(d) collected in the course of providing health services to an individual;

(e) collected incidentally to the provision of health services to an individual.

Personal Information: information about an identifiable individual, including

(a) information relating to race, national or ethnic origin, colour, religion, age or marital status;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) an identifying number, symbol or other particular assigned to the individual;

(d) address, fingerprints or blood type;

(e) the personal opinions or views of the individual;

(f) correspondence sent to a department by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the content of the original correspondence; or

(g) the views or opinions of another person in respect of the individual.

Review Request: a request by an applicant to the Information and Privacy Commissioner for a review of a department's or agency's refusal to disclose information, or a breach of the privacy provisions of the Act.

Third-Party Information: information about a group of persons, or an organization or a person, other than the applicant.

2. Newfoundland and Labrador Legislation

RSN1990 CHAPTER 25

FREEDOM OF INFORMATION ACT

Amended:

1994 c28 s7; 1996 c31; 1996 cR-10.1 s33

Schedule Amendments:

1991 c38 s3; 1991 c40 s32; 1991 c43 s10; 1994 c11 s3; 1994 c28 s7; 1995 c37 s21; 1996 cC-22.1 s.28

CHAPTER F-25

AN ACT RESPECTING FREEDOM OF INFORMATION

Analysis

1. Short title
2. Definitions
3. Purpose of Act
4. Right to information
5. Sources of information
6. Form of request
7. Reply required
8. Where request granted
9. Non-discretionary exceptions
10. Personal information
11. Discretionary exceptions
12. Appeal to Trial Division
13. Third party intervention
14. Burden of proof
15. Protection from proceedings
16. Regulations
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Schedule

Short title

1. This Act may be cited as the *Freedom of Information Act*.

1981 c5 s1

Definitions

2. In this Act

(a) "department" means

  (i) a department of the government of the province, or

  (ii) a board, commission or other body listed in the Schedule;

(b) "head" means

  (i) in the case of a department of the government of the province, the minister responsible for the administration of the department, and

  (ii) in the case of a board, commission or other body listed in the Schedule, the head of it; and

(c) "information" means information in any form including information that is written, photographed, recorded or stored by other means and on file or in the possession or under the control of a department.

1981 c5 s2; 1990 c64 s2

Purpose of Act

3. The purpose of this Act is to provide a right of access by the public to information in records of departments and to subject that right only to specific and limited exceptions necessary for the operation of the departments and for the protection of personal privacy.

1981 c5 s3

Right to information

4. Every person who is

(a) a Canadian citizen, domiciled in the province;

(b) a permanent resident of Canada within the meaning of the *Immigration Act, 1976* (Canada), domiciled in the province; or

(c) a corporation incorporated by or under a law of Canada or a province, and who is carrying on business in the province

has a right to and shall, on request, be permitted access to information under the control of a department.

1981 c5 s4; 1994 c28 s7

Sources of information

5. The Lieutenant-Governor in Council shall publish a list of all departments and, in respect of each department, a list of the general class of information prepared by or under the control of the department.

1981 c5 s5

Form of request

6. (1) A request for access to information under this Act shall be made in writing and shall be addressed to the head of the department in which the information is kept or filed.

(2) A request shall specify the subject matter of the information requested with sufficient particularity as to time, place and event to enable a person familiar with the subject matter to identify the information.

(3) Where information requested is unable to be identified the head shall so advise the person requesting and shall invite that person to supply additional details that might lead to identification of the information.

1981 c5 s6

Reply required

7. Within 30 days of the receipt of a request a head shall in writing grant, deny or under subsection 8(3) refer the request.

1981 c5 s7

Where request granted

8. (1) Where a request for information is granted by a head or the Trial Division, the head shall

(a) upon payment of the prescribed fee, allow the information to be inspected, and upon payment of the prescribed cost of reproduction, allow the information to be reproduced in whole or in part;

(b) where the information requested is published, refer the person requesting to the publication; or

(c) where the information is to be published or is required to be published at a future date, inform the person requesting of that fact and the approximate date of the publishing.

(2) Where a portion of a document contains some information that is information to which a person is refused access and that portion is severable, that portion shall be deleted and the request with respect to the remaining portion of the document shall be granted.

(3) Where a head receives a request for information that is not kept or filed in the department in respect of which that person is the head, the head shall refer that request to the department in which the information may be kept or filed and in writing notify the person requesting of that fact.

(4) When information requested has been destroyed or does not exist, the head shall advise the applicant of that fact.

1981 c5 s8

Non-discretionary exceptions

9. (1) Notwithstanding section 4, a person shall not be permitted access to information in records

(a) obtained in confidence under an agreement or arrangement between the government of the province and the Government of Canada or another province;

(b) that contain proposals or recommendations submitted, or prepared for submission, by a minister of the Crown to the Executive Council;

(c) that contain agendas of the Executive Council or recordings of deliberations or decisions of the Executive Council;

(d) used for or reflecting consultations among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) that contain briefings to ministers of the Crown in relation to matters that are before, or are proposed to be brought before, the Executive Council or that are the subject of consultations referred to in paragraph (d);

(f) that contain background explanations, analyses of problems or policy options submitted, or prepared for submission, by a minister of the Crown to the Executive Council for consideration by the Executive Council in making decisions, before those decisions are made; and

(g) that are, subject to an Act of the province, required to be kept confidential.

(2) Paragraphs (1)(b) to (f) do not apply in respect of information where disclosure of the information is authorized by the Premier of the province.

1981 c5 s9

Personal information

10. (1) Notwithstanding section 4, a person shall not be permitted access to personal information respecting an identifiable individual including,

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) an identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;

(e) the personal opinions or views of the individual;

(f) correspondence sent to a department by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the content of the original correspondence; or

(g) the views or opinions of another person in respect of the individual.

(2) Subsection (1) does not apply in respect of the following classes of information:

(a) information in respect of an individual who is or was an officer or employee of a department that relates to the position or functions of the individual;

(b) the terms of a contract of or for personal services under which an individual performs services for a department, and the opinions or views of the individual given in the course of the performance of those services except where they are given in respect of another individual;

(c) information relating to a discretionary benefit conferred on an individual, including the name of the individual and the exact nature of the benefit;

(d) personal information to which, under the provisions of some other Act of the province, a person has the right of access;

(e) information where the person who requests the information is the person to whom the information relates or where the person to whom the information relates permits in the prescribed manner access to the information by the person who requests the information; and

(f) information regarding the criminal history of an individual which, in the opinion of the minister or his or her designate, it is in the public interest to disclose.

1981 c5 s10; 1996 c31 s1

Discretionary exceptions

11. A head may refuse access to information

(a) the disclosure of which could reasonably be expected to affect adversely federal-provincial negotiations;

(b) respecting the enforcement of a law of Canada or the province, the conduct of lawful investigations or the security of correctional institutions;

(c) the disclosure of which would have a substantial adverse effect on the economic interests of the province;

(d) that would disclose legal opinions or advice provided to a person or department by a law officer of the Crown, or privileged communications as between solicitor and client in a matter of department business;

(e) indicating proposed legislation or regulations; or

(f) of a financial, commercial, scientific or technical nature the disclosure of which would affect either the continued access to that information or would affect the competitive position of a person or result in undue financial loss or gain to a person.

1981 c5 s11

Appeal to Trial Division

12. (1) A person, including a 3rd party, may within 30 days of receiving the decision of the head appeal that decision to the Trial Division.

(2) The Trial Division shall determine the matter anew and may examine information in private in order to determine on the merits whether that information may be withheld under this Act.

(3) Where a decision is under appeal to the courts, information in respect of which the decision has been appealed shall not be released by the head of a department unless the head who may have refused access to that information decides otherwise.

1981 c5 s14; 1990 c64 s2

Third party intervention

13. (1) Where the head intends to disclose information requested under this Act, that he or she has reason to believe might contain

(a) trade secrets of a 3rd party; or

(b) information described in paragraph 11(f) that was supplied by a 3rd party or that the head of a department could reasonably foresee might effect a result described in it in respect of a 3rd party,

the head shall, subject to subsection (2), where the 3rd party can reasonably be located, within 30 days after the request is received, give written notice to the 3rd party of the request and of the fact that the head intends to disclose the record or part of it.

(2) A 3rd party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the 3rd party has consented to the disclosure the 3rd party shall be considered to have waived the requirement.

(3) A notice given under subsection (1) shall include

(a) a statement that the head giving the notice intends to release a record or a part of a record that might contain material or information described in subsection (1);

(b) a description of the contents of the record or part of the record that belongs to, was supplied by or relates to the 3rd party to whom the notice is given; and

(c) a statement that the 3rd party may, within 20 days after the notice is given, make representations to the head that has control of the record as to why the record or part of the record should not be disclosed.

(4) Where a notice is given by the head under subsection (1) to a 3rd party in respect of a record or a part of the record,

(a) the 3rd party shall, within 20 days after the notice is given, be given the opportunity to make representations to the head as to why the record or the part of the record should not be disclosed; and

(b) the head shall, within 30 days after the notice is given, where the 3rd party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part of the record and give written notice of the decision to the 3rd party.

(5) Representations made by a 3rd party under paragraph (4)(a) shall be made in writing unless the head concerned waives that requirement, in which case they may be made orally.

(6) A notice given under paragraph (4)(b) of a decision to disclose a record requested under this Act or a part of a record shall include

(a) a statement that the 3rd party to whom the notice is given is entitled to request a review of the decision within 20 days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access to it or to the part of it unless, within 20 days after the notice is given, a review of the decision is requested.

(7) Where, under paragraph (4)(b), the head decides to disclose a record or part of a record requested under this Act, the head shall give the person who made the request access to the record or the part of it immediately on completion of 20 days after a notice is given under that paragraph, unless an appeal of the decision is requested under section 12.

(8) The head who has refused to give access to information requested under this Act shall immediately on being given notice of an appeal made under section 12 give written notice of the appeal to a 3rd party that the head has notified under subsection (1) in respect of the request or would have notified under that subsection where the head had intended to disclose the information or part of it.

(9) A 3rd party that has been given notice of an appeal under subsection (8) may appear as a party to the appeal.

1981 c5 s15; 1990 c64 s2

Burden of proof

14. In a proceeding under this Act the burden of establishing that access to information requested under this Act may or shall be refused shall be on the head concerned.

1981 c5 s16

Protection from proceedings

15. Notwithstanding another Act of the province, no action lies against the head or a person acting on behalf of the head, for or in relation to the disclosure in good faith of information under this Act.

1981 c5 s17

Regulations

16. The Lieutenant-Governor in Council may make regulations

(a) adding boards, commissions or other bodies to the Schedule; and

(b) generally, to give effect to the purpose of this Act.

1996 cR-10.1 s33

Fees

16.1 The Minister may set fees for providing information requested under this Act.

1996 cR-10.1 s33

Schedule

The Board of Commissioners of Public Utilities

The C.A. Pippy Park Commission

The Canada Games Park Commission

The Cancer Treatment and Research Foundation

The Central Community College

The Farm Development Loan Board

The Fisheries Loan Board of Newfoundland

The Happy Valley-Goose Bay Economic Development Corporation

The Labour Relations Board

The Labour Standards Board

The Labrador City-Wabush Economic Development Corporation

The Labrador Resources Advisory Council

The Memorial University of Newfoundland

The Newfoundland Egg Marketing Board

The Newfoundland Farm Products Corporation

The Newfoundland Hardwoods Limited

The Newfoundland Human Rights Commission

The Newfoundland Industrial Development Corporation

The Newfoundland Institute for Management Advancement and Training

The Newfoundland & Labrador Housing Corporation

The Newfoundland & Labrador Marketing Board

The Newfoundland & Labrador Public Service Commission

The Newfoundland & Labrador Youth Commission

The Newfoundland Liquor Corporation

The Newfoundland Liquor Licensing Board

The Newfoundland Medical Care Commission

The Newfoundland Municipal Financing Corporation

The Newfoundland Oceans Research Development Corporation

The Provincial Planning Board

The Public Libraries Board

The Residential Tenancies Board

The St. John's Housing Authority

The St. John's Metropolitan Area Board

The Workers' Compensation Commission

A hospital included in the Schedule to the Hospitals Act

A board, commission or other body added to this Schedule by order of the Lieutenant-Governor in Council

The college established under the *College Act, 1996*

Enterprise Newfoundland and Labrador Corporation

1981 c5 Sch; 1981 c85 s5; 1990 c36 s1; 1991 c38 s3:
1991 c40 s32: 1991 c43 s10; 1994 c11 s3:
1994 c28 s7; 1995 c37 s21; 1996 cC-22.1 s28

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CHAPTER P-22

AN ACT RESPECTING THE PROTECTION OF PERSONAL PRIVACY

Analysis

1. Short title
2. Definition
3. Violation of privacy
4. Examples
5. Defences
6. Remedies
7. Additional remedies
8. Court
9. Paramountcy
10. Rep. by 1995 cL-16.1 s30
11. Death
12. Crown bound
13. Action barred

Short title

1. This Act may be cited as the *Privacy Act.*

1981 c6 s1

Definition

2. In this Act "individual" means a natural person.

1981 c6 s2

Violation of privacy

3. (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual.

(2) The nature and degree of privacy to which an individual is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of an individual, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

1981 c6 s3

Examples

4. Proof that there has been

(a) surveillance, auditory or visual, whether or not accomplished by trespass, of an individual, by any means including eavesdropping, watching, spying, harassing or following;

(b) listening to or recording of a conversation in which an individual participates, or listening to or recording of messages to or from that individual passing by means of telecommunications, otherwise than as a lawful party to them;

(c) use of the name or likeness or voice of an individual for the purposes of advertising or promoting the sale of, or other trading in, property or services, or for other purposes of advantage to the user where, in the course of the use, the individual is identified or identifiable and the user intended to exploit the name or likeness or voice of that individual; or

(d) use of letters, diaries or other personal documents of an individual,

without the consent, expressed or implied, of the individual or some other person who has the lawful authority to give the consent is, in the absence of evidence to the contrary, proof of a violation of the privacy of the individual first mentioned.

1981 c6 s4

Defences

5. (1) An act or conduct is not a violation of privacy where

(a) it is consented to by some person entitled to consent;

(b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;

(c) the act or conduct was authorized or required under a law in force in the province or by a court or a process of a court; or

(d) the act or conduct was that of

(i) a peace officer acting in the course of his or her duty for the prevention, discovery or investigation of crime or of the discovery or apprehension of the perpetrators of a crime, or

(ii) a public officer engaged in an investigation in the course of his or her duty under a law of the province,

and was neither disproportionate to the gravity of the crime or matter subject to the investigation nor committed in the course of a trespass.

(2) A publication of a matter is not a violation of privacy where

(a) the matter published was of public interest or was fair comment on a matter of public interest; or

(b) the publication was, under the rules of law relating to defamation, privileged,

but this subsection does not extend to another act or conduct where the matter published was obtained where the other act or conduct was itself a violation of privacy.

(3) In this section

(a) "court" includes a person authorized by law to administer an oath or affirmation for the taking of evidence acting for the purposes for which the person is authorized to take evidence; and

(b) "crime" includes an offence against a law of the province.

1981 c6 s5

Remedies

6. (1) In an action for violation of privacy, the court may do the following:

(a) award damages;

(b) grant an injunction;

(c) order the defendant to account to the plaintiff, for profits that have accrued or that may later accrue to the defendant because of the violation;

(d) order the defendant to deliver to the plaintiff articles or documents that have come into the defendant's possession because of the violation; or

(e) grant other relief to the plaintiff that appears necessary under the circumstances.

(2) In awarding damages in an action for violation of privacy of an individual, the court may disregard an order made under paragraph (1)(c) in respect of the violation of privacy.

1981 c6 s6

Additional remedies

7. (1) The right of action for violation of privacy under this Act and the remedies under this Act are in addition to, and not in derogation of, another right of action or other remedy available otherwise than under this Act.

(2) This section shall not be construed as requiring damages awarded in an action for violation of privacy to be disregarded in assessing damages in other proceedings arising out of the same act, conduct or publication constituting the violation of privacy.

1981 c6 s7

Court

8. An action for violation of privacy shall be heard and determined by the Trial Division.

1981 c6 s8

Paramountcy

9. (1) This Act applies where there is a violation of the privacy of an individual.

(2) Where there is a conflict between this Act and another Act, whether general or special, this Act prevails.

1981 c6 s9

10. [repealed by 1995 cL-16.1 s30(3)]

1995 cL-16.1 s30(3)

Death

11. A right of action for violation of privacy is extinguished by the death of the individual whose privacy is alleged to have been violated.

1981 c6 s11

Crown bound

12. This Act binds the Crown.

1981 c6 s12

Action barred

13. No action lies against the minister or his or her designate under this Act as a result of the disclosure of information regarding the criminal history of a person which, in the opinion of the minister or his or her designate, it is in the public interest to disclose.

1996 c31 s2

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SN2001 CHAPTER C-14.1

CITIZENS' REPRESENTATIVE ACT
[To be Proclaimed]

Amended:

CHAPTER C-14.1

AN ACT RESPECTING THE APPOINTMENT OF A CITIZENS' REPRESENTATIVE FOR THE PROVINCE WHO SHALL HAVE THE POWERS TRADITIONALLY CONFERRED ON AN OMBUDSMAN

(Assented to May 24, 2001)

Analysis

1. Short title
2. Definitions
3. Appointment of the Citizens' Representative
4. Officer of House of Assembly
5. Term of office
6. Removal or suspension
7. Suspension when House of Assembly not sitting
8. Salary and pension
9. Expenses
10. Citizens' Representative's staff
11. Oath of office
12. Oath of staff
13. Secrecy
14. Delegation
15. Investigation
16. Reference by Lieutenant-Governor in Council
17. Reference by House of Assembly
18. Exercise of powers
19. Restriction on jurisdiction
20. Restriction on investigation by minister
21. Questions relating to jurisdiction
22. Complaints in writing
23. Privacy of communication to Citizens' Representative
24. Refusal to investigate
25. Report of refusal to investigate
26. Notice of investigation

27. Private investigation
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29. Right to be heard
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32. Restrictions on disclosure
33. Application of certain rules
34. Admissibility of evidence
35. Defence for certain offences
36. Right of entry
37. Report on investigation
38. Notice of proposed steps
39. Report to complainant
40. Review of Citizens' Representative's decision
41. Proceedings against Citizens' Representative prohibited
42. Citizens' Representative not to be called as witness
43. Annual report to House of Assembly
44. Publication of reports
45. Rules
46. Offence and penalty
47. Additional remedies
48. Schedule
49. Commencement

Schedule

Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

Short title

1. This Act may be cited as the *Citizens' Representative Act*.

2001 cC-14.1 s1

Definitions

2. In this Act

(a) "agency of the government" means a person, board, commission, association, or other body, included in the Schedule;

(b) "Citizens' Representative" means the person appointed under this Act to perform the duties and exercise the powers traditionally conferred on an ombudsman;

(c) "Commission of Internal Economy" means the commission established under the *Internal Economy Commission Act*; and

(d) "department" means a department created under the *Executive Council Act*, or a branch of the executive government of the province.

2001 cC-14.1 s2

Appointment of the Citizens' Representative

3. (1) There is established the office of the Citizens' Representative to be filled by the Lieutenant-Governor in Council on a resolution of the House of Assembly.

(2) Where

(a) the Citizens' Representative is unable to perform his or her duties of office;

(b) the office of the Citizens' Representative is vacant; or

(c) the Citizens' Representative is suspended under section 6,

the Lieutenant-Governor in Council shall appoint a person to act as the Citizens' Representative in a temporary capacity.

2001 cC-14.1 s3

Officer of House of Assembly

4. (1) The Citizens' Representative is an officer of the House of Assembly and is not eligible to be nominated for election as, elected as, or sit as, a member of the House of Assembly.

(2) The Citizens' Representative shall not hold another public office or carry on a trade, business or profession.

2001 cC-14.1 s4

Term of office

5. (1) Unless he or she sooner resigns, dies or is removed from office, the Citizens' Representative shall hold office for 6 years from the date of his or her appointment, and he or she may be re-appointed for a second term of 6 years, but shall not hold office for more than 2 terms.

(2) The Citizens' Representative may resign his or her office in writing addressed to the Speaker of the House of Assembly, or, where there is no Speaker or the Speaker is absent, to the Clerk of the House of Assembly.

2001 cC-14.1 s5

Removal or suspension

6. The Lieutenant-Governor in Council, on a resolution of the House of Assembly carried by a majority vote of the members of the House of Assembly actually voting, may, for cause, remove the Citizens' Representative from office or suspend him or her.

2001 cC-14.1 s6

Suspension when House of Assembly not sitting

7. (1) Where the House of Assembly is not in session, the Lieutenant-Governor in Council on the recommendation of the Internal Economy Commission may suspend the Citizens' Representative for incapacity, neglect of duty or misconduct, but the suspension shall not continue in force beyond the end of the next ensuing session of the House of Assembly.

(2) Where the Citizens' Representative is suspended under subsection (1), the Lieutenant-Governor in Council, on the recommendation of the Internal Economy Commission shall appoint an acting Citizens' Representative to hold office until the suspension has been dealt with in the House of Assembly.

2001 cC-14.1 s7

Salary and pension

8. (1) The Citizens' Representative shall be paid a salary fixed by the Lieutenant-Governor in Council after consultation with the Commission of Internal Economy.

(2) The salary of the Citizens' Representative shall not be reduced except on a resolution of the House of Assembly carried by a majority vote of the members of the House of Assembly actually voting.

(3) The Citizens' Representative is subject to the *Public Service Pensions Act, 1991* where he or she was subject to that Act prior to his or her appointment as Citizens' Representative.

2001 cC-14.1 s8

Expenses

9. The Citizens' Representative shall be paid the travelling and other expenses incurred by him or her in the performance of his or her duties that may be approved by the Commission of Internal Economy.

2001 cC-14.1 s9

Citizens' Representative's staff

10. (1) The Citizens' Representative may, subject to the approval of the Commission of Internal Economy and in the manner provided by law, appoint those assistants and employees that he or she considers necessary to enable him or her to carry out his or her functions under this Act.

(2) Persons employed under subsection (1) are members of the public service of the province.

2001 cC-14.1 s10

Oath of office

11. Before beginning to perform his or her duties, the Citizens' Representative shall swear an oath, or affirm, before the Speaker of the House of Assembly or the Clerk of the House of Assembly that he or she shall faithfully and impartially perform the duties of his or her office and that he or she shall not, except as provided by this Act, divulge information received by him or her under this Act.

2001 cC-14.1 s11

Oath of staff

12. Every person employed under the Citizens' Representative shall, before he or she begins to perform his or her duties, swear an oath, or affirm, before the Citizens' Representative that he or she shall not, except as provided by this Act, divulge information received by him or her under this Act.

2001 cC-14.1 s12

Secrecy

13. (1) The Citizens' Representative and every person employed under him or her shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their duties or functions under this Act.

(2) Notwithstanding subsection (1) or an oath taken or affirmation made under this Act, the Citizens' Representative may disclose in a report made by him or her under this Act those matters which he or she considers necessary to disclose in order to establish grounds for his or her conclusions and recommendations.

2001 cC-14.1 s13

Delegation

14. (1) The Citizens' Representative may in writing delegate to another person his or her powers under this Act except the power to make a report under this Act.

(2) A person purporting to exercise the power of the Citizens' Representative by virtue of the delegation under subsection (1) shall produce evidence of his or her authority to exercise that power when required to do so.

2001 cC-14.1 s14

Investigation

15. The Citizens' Representative may, on a written complaint or on his or her own initiative, investigate a decision or recommendation made, including a recommendation made to a minister, or an act done or omitted, relating to a matter of administration in or by a department or agency of the government, or by an officer, employee or member of the department or agency, where a person is or may be aggrieved.

2001 cC-14.1 s15

Reference by Lieutenant-Governor in Council

16. The Lieutenant-Governor in Council may refer to the Citizens' Representative, for investigation and report by him or her, a matter relating to administration in or by a department or agency of the government, or by an officer, employee or member of it, and the Citizens' Representative shall,

(a) subject to a special direction of the Lieutenant-Governor in Council, investigate the matter referred to him or her so far as it is within his or her jurisdiction; and

(b) make a report to the Lieutenant-Governor in Council that he or she considers appropriate.

2001 cC-14.1 s16

Reference by House of Assembly

17. The House of Assembly may refer to the Citizens' Representative, for investigation and report by him or her, any petition that is presented to it for consideration or any matter to which the petition relates, and, in that case, the Citizens' Representative shall,

(a) subject to special directions of the House of Assembly, investigate the matters referred to him or her as far as it is within his or her jurisdiction; and

(b) make a report to the House of Assembly that he or she considers appropriate,

but nothing in section 24, 25 or 39 applies in respect of an investigation or report made under this section.

2001 cC-14.1 s17

Exercise of powers

18. The Citizens' Representative may exercise and perform the powers, duties and functions conferred or imposed on him or her under this Act notwithstanding a provision of another Act to the effect that a proceeding, decision, recommendation, act or omission that he or she is investigating is

(a) final;

(b) not subject to appeal; or

(c) not subject to be challenged, reviewed, quashed or called into question.

2001 cC-14.1 s18

Restriction on jurisdiction

19. Nothing in this Act authorizes the Citizens' Representative to investigate

(a) a decision, recommendation, act, order or omission of the House of Assembly, the Lieutenant-Governor, a committee of the House of Assembly, the Lieutenant-Governor in Council, the Executive Council, or a committee of the Executive Council;

(b) an order, decision or omission of a court, a judge of a court, a master of a court, or a justice of the peace made or given in an action or proceeding in the court, or before the judge, master or justice of the peace;

(c) an award, decision, recommendation or omission of an arbitrator or board of arbitrators in an arbitration to which the *Arbitration Act* applies;

(d) a matter in respect of which there is under an Act a right of appeal or objection or a right to apply for a review on the merits of the case to a court or tribunal constituted by or under an Act, until after the right of appeal, objection or application has been exercised or until after the time limit for the exercise of that right has expired;

(e) a refusal to provide access to information under the *Freedom of Information Act*; or

(f) an action, decision or proceeding taken under the *Child, Youth and Family Services Act*.

2001 cC-14.1 s19

Restriction on investigation by minister

20. (1) Where the Minister of Justice certifies in writing to the Citizens' Representative that the investigation of a matter would be contrary to the public interest under the circumstances, the Citizens' Representative shall not investigate the matter, or, where the Citizens' Representative has commenced an investigation of the matter, he or she shall discontinue the investigation.

(2) Where a certificate is given under subsection (1), the Citizens' Representative shall include that fact and a brief description of the circumstances of the matter in his or her next annual report to the House of Assembly.

2001 cC-14.1 s20

Questions relating to jurisdiction

21. Where a question arises as to the jurisdiction of the Citizens' Representative to conduct an investigation or class of investigations under this Act, he or she may apply to the Trial Division for a declaratory order determining the question.

2001 cC-14.1 s21

Complaints in writing

22. Every complaint to the Citizens' Representative shall be made in writing.

2001 cC-14.1 s22

Privacy of communication to Citizens' Representative

23. Notwithstanding another Act, where a letter written by a person in custody on a charge or after conviction for an offence, or by an inmate or patient in a hospital, mental hospital or home, or an institution operated by or under the direction of the government, or by a person in custody of another person for another reason, is addressed to the Citizens' Representative, it shall be forwarded immediately, unopened, to the Citizens' Representative by the person in charge of the place or institution where the writer of the letter is detained or in which he or she is an inmate or patient, or by the person having custody of the writer.

2001 cC-14.1 s23

Refusal to investigate

24. (1) The Citizens' Representative, in his or her discretion, may refuse to investigate or may cease to investigate a complaint where

(a) it relates to a decision, recommendation, act or omission of which the complainant has had knowledge for more than one year before the complaint is received by the Citizens' Representative;

(b) in his or her opinion it is frivolous or vexatious or not made in good faith or concerns a trivial matter;

(c) the complainant does not have a sufficient personal interest in the subject matter of the complaint;

(d) in his or her opinion it should not be investigated or the investigation should not be continued because the public interest outweighs the interest of the person aggrieved;

(e) in his or her opinion the circumstances of the case do not require investigation; or

(f) the law, or existing administrative procedure provides an adequate remedy in the circumstances for the person aggrieved and, where the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for his or her failure to do so.

(2) Where, in the course of or after an investigation of a decision, act or omission, done or omitted by a department or agency of the government, or an officer or employee of it in the exercise of a discretion vested in that department, agency, officer, or employee, the Citizens' Representative is satisfied that the decision, act or omission is not clearly wrong or unreasonable, the Citizens' Representative shall make no further investigation of the matter and shall report to the complainant that he or she is so satisfied.

2001 cC-14.1 s24

Report of refusal to investigate

25. Where the Citizens' Representative decides not to investigate or to cease investigating a complaint, he or she shall inform the complainant, and other interested persons, of his or her decision and shall provide to them reasons for his or her decision.

2001 cC-14.1 s25

Notice of investigation

26. Before investigating a complaint, the Citizens' Representative shall inform the deputy minister, or the administrative head of the department or agency of the government affected, of his or her intention to make the investigation.

2001 cC-14.1 s26

Private investigation

27. Every investigation by the Citizens' Representative under this Act shall be conducted in private.

2001 cC-14.1 s27

Hearings

28. The Citizens' Representative may hold hearings and hear or obtain information from a person and make an inquiry that he or she considers appropriate.

2001 cC-14.1 s28

Right to be heard

29. The Citizens' Representative is not required to hold a hearing and a person is not entitled, as of right, to be heard by the Citizens' Representative, but, where it appears to the Citizens' Representative that there is sufficient grounds for his or her making a report or recommendation in respect of a matter that may adversely affect a department, agency of the government, or person, he or she shall give to the department, agency, or person, an opportunity to make representations in respect of the matter, and the department, agency, or person may make representations in respect of the matter by counsel.

2001 cC-14.1 s29

Consultation with minister

30. (1) The Citizens' Representative may, during or after an investigation, consult a minister who is concerned in the matter of the investigation.

(2) Where, during or after an investigation, the Citizens' Representative is of the opinion that there is evidence of a breach of duty or misconduct by a department or agency of the government or an officer or employee of it, he or she shall inform the deputy minister or administrative head of the department or agency of the government of his or her opinion.

2001 cC-14.1 s30

Evidence

31. (1) The Citizens' Representative may require a person who, in his or her opinion, is able to give information relating to a matter being investigated by him or her

(a) to furnish the information to him or her; and

(b) to produce a document, paper or thing that in his or her opinion relates to the matter being investigated and that may be in the possession or under the control of the person,

whether or not the person is an officer, employee or member of the department or agency of the government and whether or not the document, paper or thing is in the custody or under the control of a department or agency of the government.

(2) The Citizens' Representative may summon before him or her and examine on oath or affirmation

(a) a person who is an officer or employee or member of a department or agency of the government and who in the opinion of the Citizens' Representative is able to give information relating to a matter being investigated by him or her;

(b) a complainant; and

(c) another person who in the opinion of the Citizens' Representative is able to give information relating to a matter being investigated by him or her.

2001 cC-14.1 s31

Restrictions on disclosure

32. Where the Minister of Justice certifies that the giving of any information or the answering of any questions or the production of any document, paper or thing might involve the disclosure of

(a) the deliberations of the Executive Council or a committee of the Executive Council;

(b) proceedings of the Executive Council, or committee of the Executive Council, relating to matters of a secret or confidential nature and would be injurious to the public interest; or

(c) interfere with or impede the investigation or detection of an offence,

the Citizens' Representative shall not require the information or answer to be given or the document, paper or thing to be produced, but shall report the giving of the certificate to the House of Assembly.

2001 cC-14.1 s32

Application of certain rules

33. (1) A rule of law that authorizes or requires the withholding of a document, paper or thing, or the refusal to answer a question, on the ground that the disclosure or answering would be injurious to the public interest does not apply in respect of an investigation by or proceedings before the Citizens' Representative.

(2) A provision of an Act requiring a person to maintain secrecy in relation to, or not to disclose information relating to, a matter shall not apply in respect of an investigation by the Citizens' Representative, and a person required by the Citizens' Representative to furnish information or to produce a document, paper or thing or summoned by the Citizens' Representative to give evidence, shall not refuse to furnish the information, produce the document, paper or thing, or to answer questions on the ground of that provision.

2001 cC-14.1 s33

Admissibility of evidence

34. Except on the trial of a person for perjury, a statement made, or answer or evidence given by that or another person in the course of an investigation by or a proceeding before the Citizens' Representative is not admissible in evidence against a person in a court or at an inquiry or in another proceeding, and no evidence respecting a proceeding before the Citizens' Representative shall be given against a person.

2001 cC-14.1 s34

Defence for certain offences

35. A person is not guilty of an offence under another Act by reason of his or her compliance with a request or requirement of the Citizens' Representative to furnish information or produce a document, paper or thing, or by reason of answering a question in an investigation of the Citizens' Representative.

2001 cC-14.1 s35

Right of entry

36. (1) For the purpose of this Act, the Citizens' Representative may enter the premises occupied by a department or agency of the government and carry out an investigation within his or her jurisdiction.

(2) Upon entering a premises under subsection (1), the Citizens' Representative shall notify the deputy minister or administrative head of the department or agency of the government that occupies the premises.

2001 cC-14.1 s36

Report on investigation

37. (1) Where, after making an investigation under this Act, the Citizens' Representative is of the opinion

(a) that a decision, recommendation, act or omission that is the subject matter of the investigation appears to be

(i) contrary to law,

(ii) unreasonable,

(iii) unjust,

(iv) oppressive,

(v) improperly discriminatory,

(vi) in accordance with a practice or procedure that is or may be unreasonable, unjust, oppressive, or improperly discriminatory,

(vii) based wholly or partly on a mistake of law or fact, or

(viii) wrong;

(b) that in making a decision or recommendation, or in doing or omitting an act, a power or right has been exercised

(i) for an improper purpose,

(ii) on irrelevant grounds, or

(iii) on the taking into account of irrelevant considerations; or

(c) that reasons should have been given for a decision, recommendation, act or omission that was the subject matter of the investigation,

the Citizens' Representative shall report his or her opinion and his or her reasons and may make those recommendations that he or she considers appropriate to the appropriate minister and to the department or agency of the government concerned.

(2) In making a report under subsection (1), the Citizens' Representative may recommend

(a) that a matter should be referred to the appropriate authority for further consideration;

(b) that an omission should be rectified;

(c) that a decision should be cancelled or varied;

(d) that a practice on which a decision, recommendation, act or omission was based should be altered or reviewed;

(e) that a law on which a decision, recommendation, act or omission was based should be reconsidered;

(f) that reasons should be given for a decision, recommendation, act or omission; or

(g) that other steps should be taken.

2001 cC-14.1 s37

Notice of proposed steps

38. (1) Where the Citizens' Representative makes a recommendation under section 37, he or she may request the department or agency of the government to notify him or her within a specified time of the action it has taken or proposes to take to give effect to his or her recommendations.

(2) Where within a reasonable time after a request respecting recommendations is made under this section, no action is taken which

seems to the Citizens' Representative to be adequate and appropriate, the Citizens' Representative, in his or her discretion, after considering the comments made by or on behalf of the department or agency of the government affected, may report the matter, including a copy of the report containing the recommendations, to the Lieutenant-Governor in Council and may mention the report in the Citizens' Representative's next annual report to the House of Assembly.

(3) A report made under subsection (2) shall include comments made by or on behalf of the department or agency of the government upon the opinion or recommendation of the Citizens' Representative.

2001 cC-14.1 s38

Report to complainant

39. Where the Citizens' Representative makes an investigation on the basis of a complaint received by him or her, he or she shall report to the complainant, in the manner and at the time that he or she considers appropriate, the result of the investigation.

2001 cC-14.1 s39

Review of Citizens' Representative's decision

40. A proceeding of the Citizens' Representative is not void for want of form and, except on the ground of lack of jurisdiction, a proceeding or decision of the Citizens' Representative shall not be challenged, reviewed, quashed or called into question in a court.

2001 cC-14.1 s40

Proceedings against Citizens' Representative prohibited

41. An action does not lie against the Citizens' Representative or against a person employed under him or her for anything he or she may do or report or say in the course of the exercise or performance, or intended exercise or performance, of his or her functions and duties under this Act, unless it is shown he or she acted in bad faith.

2001 cC-14.1 s41

Citizens' Representative not to be called as witness

42. The Citizens' Representative and a person employed under him or her shall not be called to give evidence in a court or in a proceeding of a judicial or quasi-judicial nature in respect of anything coming to his or her knowledge in the exercise or performance of his or her functions and duties under this Act.

2001 cC-14.1 s42

Annual report to House of Assembly

43. The Citizens' Representative shall report annually to the House of Assembly through the Speaker on the exercise and performance of his or her functions and duties under this Act.

2001 cC-14.1 s43

Publication of reports

44. Where it is in the public interest, or in the interest of a person, department or agency of the government, the Citizens' Representative may publish reports relating generally to the exercise and performance of his or her functions and duties under this Act or to a particular case investigated by him or her, whether or not the matters to be dealt with in the report have been the subject of the report made to the House of Assembly under this Act.

2001 cC-14.1 s44

Rules

45. (1) The Commission of Internal Economy may make rules for the guidance of the Citizens' Representative in the exercise and performance of his or her functions and duties under this Act.

(2) Except where rules respecting it are made under subsection (1), the Citizens' Representative may determine his or her procedure.

2001 cC-14.1 s45

Offence and penalty

46. A person who

(a) without lawful justification or excuse wilfully obstructs, hinders, or resists the Citizens' Representative or another person in the exercise or performance of his or her functions and duties under this Act;

(b) without lawful justification or excuse refuses or wilfully fails to comply with a lawful requirement of the Citizens' Representative or another person under this Act; or

(c) wilfully makes a false statement to or misleads or attempts to mislead the Citizens' Representative or another person in the exercise or performance of his or her functions and duties under this Act, is guilty of an offence and liable, on summary conviction, to a fine of not more than $500 or to imprisonment for a term not exceeding 3 months, or to both.

2001 cC-14.1 s46

Additional remedies

47. The provisions of this Act are in addition to the provisions of another Act or rule of law under which a remedy or right of appeal or objection is provided for a person, or a procedure is provided for the inquiry into or investigation of a matter, and nothing in this Act limits or affects that remedy or right of appeal or objection or procedure.

2001 cC-14.1 s47

Schedule

48. (1) The Lieutenant-Governor in Council may, by order, add or remove a person, board, commission, association or other body to or from the Schedule.

(2) An order made under subsection (1) is subordinate legislation for the purpose of the *Statutes and Subordinate Legislation Act*.

(3) Notwithstanding subsection (1), a person, board, commission, association or other body shall not be removed from the Schedule unless the removal is recommended by the Commission of Internal Economy.

2001 cC-14.1 s48

Commencement

49. This Act comes into force on a day to be proclaimed by the Lieutenant-Governor in Council.

2001 cC-14.1 s49

Schedule

The Agricultural Products Marketing Board

The Board of Commissioners of Public Utilities

Business Investment Corporation

The C.A. Pippy Park Commission

The Cancer Treatment and Research Foundation

The College of the North Atlantic

Criminal Code Mental Disorder Review Board (section 672.38 *Criminal Code)*

The Dairy Farmers of Newfoundland and Labrador

Day Care and Homemaking Services Licensing Board

Edge Corporation Evaluation Board

The Egg Producers of Newfoundland and Labrador

Enterprise Newfoundland and Labrador Corporation

A health care corporation incorporated under the *Hospitals Act*

A health and community services board incorporated under the *Hospitals Act*

Insurance Adjusters, Agents and Brokers Appeal Board

The Labour Relations Board

An adjudicator appointed under section 67 of the *Labour Standards Act*

Livestock Owners Compensation Board

The Memorial University of Newfoundland

Mental Health Review Board

Mineral Rights Adjudication Board

Mining Tax Review Board

Multi-Materials Stewardship Board

Municipal Assessment Agency referred to in the *Assessment Act*

The Newfoundland Chicken Marketing Board

Newfoundland Crop Insurance Agency

The Newfoundland Human Rights Commission

The Newfoundland Industrial Development Corporation

Newfoundland Legal Aid Commission

The Newfoundland Liquor Corporation

The Newfoundland Liquor Licensing Board

The Newfoundland Municipal Financing Corporation

Newfoundland and Labrador Arts Council

Newfoundland and Labrador Centre for Health Information

Newfoundland and Labrador Education Investment Corporation

Newfoundland and Labrador Geographical Names Board

The Newfoundland and Labrador Housing Corporation

Newfoundland and Labrador Student Investment and Opportunity Corporation

The Private Training Corporation

Provincial Apprenticeship Board

The Provincial Information and Library Resources Board

The Public Service Commission

Royal Newfoundland Constabulary Public Complaints Commission

A school board, including the conseil scolaire francophone elected under the *Schools Act, 1997*

Social Assistance Appeal Board

Timber Scalers Board

An appeal board established under section 40 of the *Urban and Rural Planning Act, 2000*

Workers' Compensation Review Division

The Workplace Health, Safety and Compensation Commission

A corporation, the ownership of which, or a majority of the shares of which is vested in the Crown

A corporation, commission or board the majority of the members of which, or the majority of the members of the board of directors of which are appointed by the Lieutenant-Governor in Council

A board, commission or other body added to this Schedule by order of the Lieutenant-Governor in Council

2001 cC-14.1 Sch

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3. Legislation
(Comparison Tables)

Table 1: Coverage

Jurisdiction	Prov. Gov't Departments	Municipalities	School Boards	Health Care Institutions	Colleges and Universities	Self-governing professions
Newfoundland	Yes	No	No	Yes	Yes	No
Nova Scotia	Yes	Yes	Yes	Yes	Yes	No
Prince Edward Island	Yes*	No*	No*	No*	No*	No*
New Brunswick	Yes	No	Yes	Yes	No	No
Quebec	Yes	Yes	Yes	Yes	Yes	No
Ontario	Yes	Yes	Yes	No	No	No
Manitoba	Yes	Yes	Yes	Yes	Yes	No
Saskatchewan	Yes	Yes	Yes	Yes	Yes	No
Alberta	Yes	Yes	Yes	Yes	Yes	No
British Columbia	Yes	Yes	Yes	Yes	Yes	Yes

*The Prince Edward Island Act was assented to on May 15, 2001 but has not yet been proclaimed. When proclaimed, the Act will initially apply only to line departments.

This table was adapted from: Alasdair Roberts, *School of Policy Studies Queen's University, Assessing the Health of Canada's Freedom of Information Laws*, April 1998, page 69.

Table 2: Cabinet Confidences

	Law				
	Federal	Newfoundland	Nova Scotia	Prince Edward Island	Ontario
Exceptions to Protection:					
Time limit	yes, 20 years	no	yes, 10 years	yes, 15 years	yes, 20 years
Background and analysis	no	no	yes, after decision made public, implemented or after five years	yes, after decision made public, implemented or after five years	yes, after decision made and implemented
Cabinet decision as appeal body	no	no	yes	yes	no
Cabinet consent for specific disclosure	yes	no, but premier may disclose	no	no	yes
Public interest override	no	no	yes, general public interest (significant and clearly)	yes, general public interest (significant and clearly)	yes grave harm to environment, public health and safety

	Law			
	Manitoba	Saskatchewan	Alberta	British Columbia
Exceptions to Protection:				
Time limit	yes, 30 years	yes, 25 years	yes, 15 years	yes, 15 years
Background and analysis	no	no	yes, after decision made public, implemented or after five years	yes, after decision made public, implemented or after five years
Cabinet decision as appeal body	no	no	yes	yes
Cabinet consent for specific disclosure	yes	yes	no	no
Public interest override	no	no	yes, general public interest (significant and clearly)	yes, general public interest (significant and clearly)

Adapted from: "Appendix A," *The Access to Information Act and Cabinet Confidences: A Discussion of New Approaches*, RPG Information Services Inc. for the Information Commissioner of Canada, Ottawa, 1996.

Table 3: Review Mechanism

Jurisdiction	Review Officer*	Order Power**	Appeal to court provided in law	Basis of court appeal, if any
Newfoundland	No	N/A	Yes. Appeal to Trial Division (s.12)	The trial division shall determine the matter anew. S.12(2)
Nova Scotia	Yes	No	Yes. Appeal to the Supreme Court: s.32(3), 41(1)	No authority to reverse discretionary exemptions: s. 42(6)
Prince Edward Island	Yes	Yes	No	Judicial Review
New Brunswick	Yes	No	Yes. Appeal to Court of Queen's Bench: s(7), (8), (11)	Facts and law (s.8)
Quebec	Yes	Yes	yes appeal to court of Quebec. S.147-154	Questions of law or jurisdiction; s.149
Ontario	Yes	Yes	No	Judicial Review
Manitoba	Yes	No	Yes: s.67	S.69: court shall consider appeal under s.67 or s.68 as a new matter and may hear evidence by affidavit.
Saskatchewan	Yes	No	Yes: s. 57, FOIA.	De Novo review, although the court may not reverse discretionary exemptions: s.58(6)
Alberta	Yes	Yes	No	Judicial Review
British Columbia	Yes	Yes	No	Judicial Review

* Review Officer: refers to the person appointed under the Act to review decisions respecting disclosure of information and protection of privacy.

** Order Power: provides review officers the authority to resolve complaints and order disclosure of documents. The other system is an investigative model, in which a review officer has the power to investigate, mediate and recommend. The latter is an ombudsman-like role, where the officer does not have the power to order disclosure of documents.

Table 4: Freedom of Information Laws in Canada

Jurisdiction	Title
Canada	*Privacy Act*
Canada	*Access to Information Act*
Newfoundland	*Freedom of Information Act*
Nova Scotia	*Freedom of Information and Protection of Privacy Act*
Prince Edward Island	*Freedom of Information and Protection of Privacy Act*
New Brunswick	*Right to Information Act*
New Brunswick	*Protection of Personal Information Act*
Quebec	*An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*
Ontario	*Freedom of Information and Protection of Privacy Act*
Ontario	*Municipal Freedom of Information and Protection of Privacy Act*
Manitoba	*The Freedom of Information and Protection of Privacy Act*
Saskatchewan	*Freedom of Information and Protection of Privacy Act*
Saskatchewan	*Local Authority Freedom of Information and Protection of Privacy Act*
Alberta	*Freedom of Information and Protection of Privacy Act*
British Columbia	*Freedom of Information and Protection of Privacy Act*
Nunavut	*Access to Information and Protection of Privacy Act*
Northwest Territories	*Access to Information and Protection of Privacy Act*
Yukon	*Access to Information and Protection of Privacy Act*

*Assented to on May 15, 2001 but not proclaimed.

Adapted from Alasdair Roberts, School of Policy Studies Queen's University, *Assessing the Health of Canada's Freedom of Information Laws*, April 1998, p. 68.

Table 5: Fees

Jurisdiction	Application Fee	Search Fee	Copying Fee
Federal	$5.00	$2.50/quarter hr. In excess of 5 hrs.	$0.20 per page
Newfoundland	$5.00	$15.00/hr in excess of 2 hrs.	$0.25 per page
Nova Scotia	$5.00	$10.00/half hr. in excess of 2 hrs.	$0.20 per page
New Brunswick	$5.00		$0.10 per page
Quebec			$0.25 per page
Ontario	$5.00	$7.50/quarter hr.	$0.20 per page
Manitoba		$15.00/half hr. in excess of 2 hrs.	$0.20 per page
Saskatchewan		$15.00/half hr. in excess of 2 hrs.	$0.25 per page
Alberta	$25.00	$6.75/quarter hr.	$0.25 per page
British Columbia		$7.50/quarter hr. in excess of 3 hrs.	$0.25 per page

This is not intended to be an all-inclusive table of fees charged in each jurisdiction. However, it does present a good indication of the variance of fees charged across jurisdictions.

4. Consultations

Freedom of Information Review Committee
Public Consultations

Public Presentations to the Committee (in order of presentation)

Dave Barker, Grand Falls -Windsor
Newfoundland - Labrador Human Rights Association
Brent Rockwood, St. John's
Russell Wangersky, *The Telegram*
City of St. John's
Newfoundland & Labrador Centre for Health Information
Peter Gullage, CBC Radio
City of Mount Pearl
Institute for the Advancement of Public Policy
Newfoundland and Labrador Health Boards Association
St. John's Junior Chamber of Commerce
Town of Happy Valley - Goose Bay
Humber Environmental Action Group
Main River Coalition
City of Corner Brook
Community Recycling and Waste Management
Jack Kennedy, Corner Brook

Written Submissions to the Committee (reproduced in Volume 2)

Innu Nation
Newfoundland & Labrador Centre for Health Information
Newfoundland and Labrador Health Boards Association
Newfoundland - Labrador Human Rights Association
Newfoundland and Labrador Federation of Municipalities
City of Mount Pearl
City of St. John's
Office of the Auditor General
The Institute for the Advancement of Public Policy
The Telegram

Other Consultations

Federal Access to Information Review Task Force, Ottawa
Hon. John M. Reid, Information Commissioner of Canada, Ottawa
Staff, Privacy Commissioner of Canada, Ottawa
Darce Fardy, Nova Scotia Review Officer
Dr. Ann Cavoukian, Information and Privacy Commissioner, Ontario
Government Caucus representatives
Progressive Conservative Opposition Caucus representatives
Jack Harris, Leader of the New Democratic Party
Ambrose Peddle, Former Ombudsman for Newfoundland and Labrador
Town of Happy Valley-Goose Bay
Town of Grand Falls - Windsor
Newfoundland and Labrador School Boards Association
School District #2 - Northern Peninsula/Labrador South
Fonse Faour, Chair, Public Service Commission, Newfoundland and Labrador
Deputy Minister representatives
Government Records Management and Information Technology representatives

Call for Submissions

REVIEW OF FREEDOM OF INFORMATION ACT AND REGULATIONS

The Freedom of Information Review Committee is soliciting submissions from interested groups and individuals wishing to make representation on any aspect of the *Freedom of Information Act and Regulations.* Written submissions are encouraged and will be accepted up to March 16, 2001. The Committee also plans to schedule a number of public meetings across the province to provide an opportunity for interested parties to make oral presentations.

The Review Committee was appointed by the provincial government to review and make recommendations (by July, 2001) on all aspects of the *Freedom of Information* legislation, including but not limited to recommendations dealing with the following:

- the need for a new review mechanism to examine decisions respecting the disclosure of information;
- the composition and powers of any recommended review mechanism;
- the appropriate exemptions from disclosure of the Act;
- amendments necessary to deal properly with new forms of information such as e-mail; and
- appropriate time periods for government departments and agencies to respond to requests for information.

Those requiring further information or wishing to make a submission, oral or written, should contact the Committee by:

calling.... (709)729-1622
faxing..... (709)729-0478
e-mailing..foirc@mail.gov.nf.ca
writing.....Freedom of Information Review Committee
2nd floor, Beothuck Building
20 Crosbie Place
St. John's, NF
A1B 3Y8

Freedom of Information Review Committee
Province of Newfoundland and Labrador

Public Meetings

The Review Committee examining the Province's Freedom of Information Act will hold a series of public meetings across the province during the last two weeks of March, 2001.

These meetings are intended to provide an opportunity for interested individuals and groups to make oral presentations on any aspect of access to information legislation and regulations.

The Committee was appointed by Government to review the current Freedom of Information Act and Regulations. The Committee's report will be presented to the Minister of Justice by July, 2001.

The dates and locations of the public meetings are as follows:

DATE	COMMUNITY	LOCATION
Tuesday, March 20, 2001	Grand Falls-Windsor	Mt. Peyton Hotel
Thursday, March 22, 2001	St. John's	Fairmont Hotel
Monday, March 26, 2001	Happy Valley, Goose Bay	Aurora Hotel
Thursday, March 29, 2001	Corner Brook	Holiday Inn

Individuals and groups who wish to make an oral presentation are asked to contact the Freedom of Information Committee Office at least 24 hours prior to the date of the public meeting.

To reach the Freedom of Information Committee Office:

Telephone: 709-729-1622
Fax: 709-729-0478
E-mail: foirc@mail.gov.nf.ca

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STRIKING THE BALANCE

The Right to Know & the Right to Privacy

The Freedom
of Information
Review Committee

Volume 2: Written Submissions • July 2001

Striking the Balance

The Right to Know & the Right to Privacy

The Freedom of Information
Review Committee

Volume 2: Written Submissions

St. John's, Newfoundland, July 2001

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Note to Reader

This is the second volume of the Report of the Freedom of Information Review Committee. It contains written submissions received by the Committee. The Committee's findings and recommendations are set forth in Volume 1.

The submissions contained in this volume have not been altered in any way, and are provided as background to the Committee's findings.

Copies of both volumes may be obtained from

The Queen's Printer
Confederation Building
P.O. Box 8700
St. John's, Newfoundland
Canada, A1B 4J6

Phone: (709) 729-3649
Fax: (709) 729-1900
E-Mail: queensprinter@gov.nf.ca

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Written Submissions:

1. Innu Nation
2. Newfoundland & Labrador Centre for Health Information
3. Newfoundland and Labrador Health Boards Association
4. Newfoundland - Labrador Human Rights Association
5. Newfoundland and Labrador Federation of Municipalities
6. City of Mount Pearl
7. City of St. John's
8. Office of the Auditor General of Newfoundland
9. The Institute for the Advancement of Public Policy
10. The Telegram

Acknowledgements

The comprehensive review of the provisions and operation of the *Freedom of Information Act* could not have been completed without the active involvement of many people, throughout the province and across this country, who generously shared their knowledge and experience with the Review Committee.

The Committee wishes to express their appreciation to all those who participated in the consultation process in many different ways - at public meetings , in interviews and by other means.

In particular, however, the Committee wishes to thank the individuals and organizations who shared their views in the following written submissions.

The Freedom of Information Review Committee

Chairperson
Joan Dawe

Committee Members
Dennis Browne, Q.C.
Siobhan Coady
Dr. Leonard Williams

Executive Director
Dr. Melvin Regular

Legal Researcher
Stephen Ring

Administrative Assistant
Lynne Comeau

Editorial Advisor
Robert Pitt

Committee Mandate

On December 12, 2000 the Freedom of Information Review Committee was established by Newfoundland and Labrador's Minister of Justice and mandated to review and make recommendations on all aspects of the current Newfoundland and Labrador *Freedom of Information Act*. The work of the Committee included, but was not limited to, reviewing and making recommendations regarding

(i) the need for a new review mechanism to examine decisions respecting the disclosure of information;

(ii) the composition and powers of any recommended review mechanism;

(iii) the appropriate exemptions from disclosure under the Act;

(iv) amendments necessary to deal properly with new forms of information such as e-mail; and

(v) appropriate time periods for government departments and agencies to respond to requests for information.

Consultation and Review Process

To carry out its mandate, the Committee undertook a comprehensive review of relevant literature, examined freedom of information legislation from other provinces and the Federal Government, and conducted a series of consultations across the province and with representatives of other Canadian jurisdictions.

The consultation process consisted of a series of four public hearings in Newfoundland and Labrador; direct consultations with several provincial and federal information and privacy commissioners; meetings with key stakeholders within the community and the Provincial Government, and an invitation for written submissions and comments from any interested party.

During the course of its work, the Committee heard from a variety of private citizens, government representatives, agencies and interest groups. Those sharing their experiences and offering advice included representatives of school boards, health and community services boards, and municipal governments, as well as business people, information managers, the media, community leaders and experts in the fields of access and privacy rights.

Volume 1 of the Report contains the Committee's findings and recommendations. It also includes, in the Appendices, the locations of the public meetings, the names of individuals participating and others with whom the Committee consulted, and a bibliography of the reports, background information and statutes reviewed in the course of the Committee's research.

This volume contains the texts of written submissions received by the Committee.

Written Submissions

1. Innu Nation

Briefing Notes for Innu Nation

Review Committee on the *Freedom of Information Act and Regulations*
26 March 2001

Overview of Key Points:

Innu Nation has serious frustrations and concerns with the existing *Act*. It is:

- limited in scope
- ineffective in practice; and
- restricts, rather than permits, access to government information

In order to meet the needs for access to information within the Province, and provide a right of access for citizens, the Act requires a significant overhaul. New mechanisms are required in the legislation, including:

- a redefined and reinvigorated statement of the purpose of the Act, and guarantees of rights of access to information
- broad and inclusive application of the *Act* to all government and Crown agencies, including Newfoundland and Labrador Hydro and other Crown corporations
- a clear and explicit framework for accessing information, subject only to such limitations on access that are reasonable in a free and democratic society;
- mechanisms which balance the rights of third parties with the need for accountable government and public scrutiny of government action;
- a limitation period for exclusions, so that materials of historical significance are made accessible;
- and perhaps most importantly, an independent, accountable commissioner who can investigate and arbitrate requests for information to which access is denied

Innu Nation recognizes that the rights of access to information must be balanced against the rights of personal privacy and the needs of agencies, organizations to protect personal, political, economically and culturally sensitive information. This is a balancing act, and we recognize the difficulties inherent in the exercise.

We believe that the best approach to resolving these difficulties is a commitment, in the *Act*, to openness and transparency in government, with specified exemptions for certain classes of information that are recognized as valid and reasonable limits on access to information.

Scope of the *Act*

The Act must apply to all government and Crown agencies, including Crown corporations, municipalities, boards, tribunals, and other entities. As governments continue to devolve powers and adminstrative responsibilities to agencies outside of government, important information is being placed outside of the ambit of the present Act. Governments are also becoming more reliant on outside consultants and other service providers for advice and information on matters of public policy. Information which is produced by private parties at government request, and at public expense, must be accessible to the people of this Province under the *Act*.

Another area of significant concern for the Innu Nation is environmental regulation. We recognize that environmental complicance is becoming, in many sectors, a self-regulating and self-reporting exercise, where vital information about environmental health and safety is under the control of private companies, rather than public regulators. The environmental health and security of citizens is a matter of the highest importance, and access to this kind of information must fall within the ambit of the revised *Act*.

We are also concerned about the failure of public agencies, including the Newfoundland Dept. of Environment, to disclose information it collects about water quality, to cite only one recent example, to the citizens it is supposed to inform and protect.

Access Concerns

To be effective, the *Act* must be accessible. Beyond a nominal fee for the initial request and reasonable costs for document duplication, any additional costs associated with access to information should, in the view of the Innu Nation, be incurred by the agencies responsible for housing the information. The Act can become an important part of encouraging transparency within departments by imposing cost burdens on departments which choose not to organize their information in a way that allows it to be readily accessible.

Oversight

The revised *Act* must provide for an independent, publicly accountable commission with legislated powers to oversee the application and administration of the *Act*, and to review decisions respecting the disclosure of information.

To be perceived as independent and effective, the commission should be headed by a commissioner, who should be an officer of the Legislature, not a member of the civil service. The commissioner should be appointed by the Lieutenant Governor on the recommendation of a joint committee of the Legislature for a 6 year term, to ensure continuity and to protect him or her from adverse political influence.

The commission must have powers to:

- investigate and adjudicate complaints about the handling of requests for information under the *Act*;
- order disclosure of records in cases where citizen complaints are justified.
- monitor compliance with the *Act* within government. Public institutions should be required to provide the commission with annual statistics on their handling of information requests. The commission should use this information to make public reports to the Legislature and to the citizens of the province.
- deal with department or agencies that systematically fall out of compliance the requirements of the *Act*, and where necessary, issue orders to bring the institution into compliance.
- research, report and make recommendations to the Legislature and to the people of the Province on issues relating to access to information;

Gaps in Protection for Information

Recognizing that our primary concern is to ensure accessibility, we recognize that there is a need for confidentiality and protection for certain types of information. We are concerned that there is currently no explicit protection under the Act for a number of areas of concern to Innu Nation, including:

- access to information concerning the location of potentially sensitive cultural or historic sites, which could result in damage to Innu history and culture;
- access to information concerning the locations of potentially sensitive ecological sites, such as nesting locations for endangered species, which could result in damage to conservation efforts;
- access to information regarding treaty and other negotiations with the Innu Nation and other aboriginal groups in the Province;

These gaps should be addressed in the revisions to the Act.

Innu Nation Experiences with the Present *Act*

The existing Act, especially after recourse to the Provincial Ombudsman was abolished in 1991, has served to preserve and promote a culture of secrecy and unaccountability within the provincial government. This has had serious effects on the relationship between the Innu Nation and the Province, and has frustrated, on more than one occasion, our ability to access information that relates to our land, our health, our way of life, and our future. I'd like to relate a few examples:

- in 1991, the Innu Nation attempted to access the results of a study conducted on mercury levels in the community of Sheshatshiu by health workers employed by the International Grenfell Association in 1978. We were told that the information could not be disclosed under the *Act*.
- In 1993, the Innu Nation sought information prepared for the Province of Newfoundland by Fiander-Good Associates concerning the economic benefits of the proposed Trans-Labrador Highway. An appearance before the Newfoundland Supreme Court was necessary to secure access to the information.
- Even once access was obtained to the information we were seeking regarding the Trans-Labrador Highway under the control of the Department of Works, Services and Transportation, we were advised in April 1994 by then-Minister Efford to pay the consulting firm their normal rates for the reproduction of the study, *contra* to the provisions of Regulation 223/87, which limited the costs for access to information to reasonable costs for photocopying, compling information or computer usage. This directive seriously frustrated the ability of the Innu Nation to gain access to the information that we were entitled to obtain.

Following the frustration of our efforts in 1994, we concluded that the legislation offered little, if any, reasonable access to information that we could not obtain through other means.

Relationship of the *Act* to Consultation Requirements Under *Delgammukw*

The *Delgamuukw* decision of the Supreme Court of Canada in 1997 imposed an obligation for governments to consult with aboriginal groups where government action might infringe aboriginal rights and title.

The *Delgamuukw* consultation requirement has opened up a new government-to-government channel for Innu Nation to access information, but the consultation obligation is still subject to differing interpretations regarding its application, and should not become a substitute for our rights to access to information under a law of general application.

Even after *Delgamuukw*, our attempts to access information of direct concern to the Innu Nation has been frustrated under the Act. Prior to the announcement of the Lower Churchill Development in March, 1998, the Innu Nation attempted to gain information about the status of negotiations where were talking place between representatives of Newfoundland and Labrador Hydro and Hydro Quebec. In a letter sent to Innu Nation President Katie Rich in January 1998, Premier Tobin denied that such negotiations were taking place.

Two months later, a multi-billion dollar deal was announced in Churchill Falls.

Subsequent requests for information under the *Act* were denied, as Newfoundland and Labrador Hydro is not subject to the requirements of the *Act*, even though it acted as an agent for the Province of Newfoundland in dealings with Hydro Quebec.

We could spend a great deal more time recounting the failings of the present Act, but these illustrations are intended to underscore the need for major revisions and improvements.

Summary of recommendations:

The Act must be revised to include:

- a redefined and reinvigorated statement of the purpose of the Act, and guarantees of rights of access to information

- broad and inclusive application of the *Act* to all government and Crown agencies, including Newfoundland and Labrador Hydro and other Crown corporations

- a clear and explicit framework for accessing information, subject only to such limitations on access that are reasonable in a free and democratic society;

- mechanisms which balance the rights of third parties with the need for accountable government and public scrutiny of government action;

- the Act must be accessible to all citizens. Beyond a nominal cost ($5.00 is reasonable) for a request, any additional costs associated with access to information should be incurred by the agencies responsible for housing the information

- a limitation period for exclusions, so that materials of historical significance are made accessible after a period of 15 years.

- and perhaps most importantly, an independent, accountable commissioner who can investigate and arbitrate requests for information to which access is denied.

The Act must also provide:

- explicit protection against disclosures which could reasonably be expected to result in damage to sites of historical, cultural or ecological importance.
- explicit protections against disclosures which may prejudice or otherwise impair negotiations or other discussions between aboriginal governments and the Province of Newfoundland.
- guarantees that the Act will not be interpreted or applied to limit, derogate or otherwise impair access to information by aboriginal governments under aboriginal or treaty rights;

In the view of the Innu Nation, the model adopted in by the BC Legislature in the *Freedom of Information and Protection of Privacy Act* (RSBC 1996, c. 165) represents the approach that most closely matches our needs and concerns. We would recommend the BC Act to this committee for careful review.

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FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

[RSBC 1996] CHAPTER 165

[Updated to November 2, 1999]

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Part 1 ó Introductory Provisions

Definitions

1 Schedule 1 contains definitions of terms used in this Act.

Purposes of this Act

2 (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records,

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,

(c) specifying limited exceptions to the rights of access,

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act.

(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

Scope of this Act

3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;

(b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity;

(c) a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

(c.1) a record that is created by or for, or is in the custody or control of, the Children's Commission and that relates to the exercise of the commission's functions under the *Children's Commission Act;*

(d) a record of a question that is to be used on an examination or test;

(e) a record containing teaching materials or research information of employees of a post-secondary educational body;

(f) material placed in the British Columbia Archives and Records Service by or for a person or agency other than a public body;

(g) material placed in the archives of a public body by or for a person or agency other than the public body;

(h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

(i) a record of an elected official of a local public body that is not in the custody or control of the local public body.

(2) This Act does not limit the information available by law to a party to a proceeding.

Part 2 ó Freedom of Information

Division 1 ó Information Rights and How to Exercise Them

Information rights

4 (1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of any fee required under section 75.

How to make a request

5 (1) To obtain access to a record, an applicant must make a written request to the public body that the applicant believes has custody or control of the record.

(2) The applicant may ask for a copy of the record or ask to examine the record.

Duty to assist applicants

6 (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

(2) Moreover, the head of a public body must create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

Time limit for responding

7 The head of a public body must respond not later than 30 days after a request is received unless

(a) the time limit is extended under section 10, or

(b) the request has been transferred under section 11 to another public body.

Contents of response

8 (1) In a response under section 7, the head of the public body must tell the applicant

(a) whether or not the applicant is entitled to access to the record or to part of the record,

(b) if the applicant is entitled to access, where, when and how access will be given, and

(c) if access to the record or to part of the record is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review under section 53 or 63.

(2) Despite subsection (1) (c) (i), the head of a public body may refuse in a response to confirm or deny the existence of

(a) a record containing information described in section 15 (information harmful to law enforcement), or

(b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy.

How access will be given

9 (1) If an applicant is told under section 8 (1) that access will be given, the head of the public body concerned must comply with subsection (2) or (3) of this section.

(2) If the applicant has asked for a copy under section 5 (2) and the record can reasonably be reproduced,

(a) a copy of the record or part of the record must be provided with the response, or

(b) the applicant must be given reasons for the delay in providing the record.

(3) If the applicant has asked to examine the record under section 5 (2) or if the record cannot reasonably be reproduced, the applicant must

(a) be permitted to examine the record or part of the record, or

(b) be given access in accordance with the regulations.

Extending the time limit for responding

10 (1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the commissioner's permission, for a longer period if

(a) the applicant does not give enough detail to enable the public body to identify a requested record,

(b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body,

(c) more time is needed to consult with a third party or other public body before the head can decide whether or not to give the applicant access to a requested record, or

(d) a third party asks for a review under section 52 (2) or 62 (2).

(2) If the time is extended under subsection (1), the head of the public body must tell the applicant

(a) the reason,

(b) when a response can be expected, and

(c) that the applicant may complain about the extension under section 42 (2) (b) or 60 (1) (a).

Transferring a request

11 (1) Within 10 days after a request for access to a record is received by a public body, the head of the public body may transfer the request and, if necessary, the record to another public body if

(a) the record was produced by or for the other public body,

(b) the other public body was the first to obtain the record, or

(c) the record is in the custody or under the control of the other public body.

(2) If a request is transferred under subsection (1),

(a) the head of the public body who transferred the request must notify the applicant of the transfer, and

(b) the head of the public body to which the request is transferred must respond to the applicant in accordance with section 8 not later than 30 days after the request is received by that public body unless this time limit is extended under section 10.

Division 2 ó Exceptions

Cabinet and local public body confidences

12 (1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

(2) Subsection (1) does not apply to

(a) information in a record that has been in existence for 15 or more years,

(b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or

(c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if

(i) the decision has been made public,

(ii) the decision has been implemented, or

(iii) 5 or more years have passed since the decision was made or considered.

(3) The head of a local public body may refuse to disclose to an applicant information that would reveal

(a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts or a draft of a private Bill, or

(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

(4) Subsection (3) does not apply if

(a) the draft of the resolution, bylaw, other legal instrument or private Bill or the subject matter of the deliberations has been considered in a meeting open to the public, or

(b) the information referred to in that subsection is in a record that has been in existence for 15 or more years.

Policy advice, recommendations or draft regulations

13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

(b) a public opinion poll,

(c) a statistical survey,

(d) an appraisal,

(e) an economic forecast,

(f) an environmental impact statement or similar information,

(g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,

(h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,

(i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,

(j) a report on the results of field research undertaken before a policy proposal is formulated,

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

(l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or

(n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

(3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

Legal advice

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Disclosure harmful to law enforcement

15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

(b) prejudice the defence of Canada or of any foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism,

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

(d) reveal the identity of a confidential source of law enforcement information,

(e) reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities,

(f) endanger the life or physical safety of a law enforcement officer or any other person,

(g) reveal any information relating to or used in the exercise of prosecutorial discretion,

(h) deprive a person of the right to a fair trial or impartial adjudication,

(i) reveal a record that has been confiscated from a person by a peace officer in accordance with an enactment,

(j) facilitate the escape from custody of a person who is under lawful detention,

(k) facilitate the commission of an offence under an enactment of British Columbia or Canada, or

(l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

(2) The head of a public body may refuse to disclose information to an applicant if the information

(a) is in a law enforcement record and the disclosure would be an offence under an Act of Parliament,

(b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record, or

(c) is about the history, supervision or release of a person who is in custody or under supervision and the disclosure could reasonably be expected to harm the proper custody or supervision of that person.

(3) The head of a public body must not refuse to disclose under this section

(a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act,

(b) a report, including statistical analysis, on the degree of success achieved in a law enforcement program unless disclosure of the report could reasonably be expected to interfere with or harm any of the matters referred to in subsection (1) or (2), or

(c) statistical information on decisions under the *Crown Counsel Act* to approve or not to approve prosecutions.

(4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute

(a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or

(b) to any other member of the public, if the fact of the investigation was made public.

Disclosure harmful to intergovernmental relations or negotiations

16 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:

(i) the government of Canada or a province of Canada;

(ii) the council of a municipality or the board of a regional district;

(iii) an aboriginal government;

(iv) the government of a foreign state;

(v) an international organization of states,

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

(c) harm the conduct of negotiations relating to aboriginal self government or treaties.

(2) Moreover, the head of a public body must not disclose information referred to in subsection (1) without the consent of

(a) the Attorney General, for law enforcement information, or

(b) the Executive Council, for any other type of information.

(3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 or more years unless the information is law enforcement information.

Disclosure harmful to the financial or economic interests of a public body

17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

(a) trade secrets of a public body or the government of British Columbia;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the government of British Columbia.

(2) The head of a public body may refuse to disclose under subsection (1) research information if the disclosure could reasonably be expected to deprive the researcher of priority of publication.

(3) The head of a public body must not refuse to disclose under subsection (1) the results of product or environmental testing carried out by or for that public body, unless the testing was done

(a) for a fee as a service to a person, a group of persons or an organization other than the public body, or

(b) for the purpose of developing methods of testing.

Disclosure harmful to the conservation of heritage sites, etc.

18 The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of,

(a) fossil sites, natural sites or sites that have an anthropological or heritage value,

(b) an endangered, threatened or vulnerable species, subspecies or race of plants, vertebrates or invertebrates, or

(c) any other rare or endangered living resources.

Disclosure harmful to individual or public safety

19 (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

Information that will be published or released within 60 days

20 (1) The head of a public body may refuse to disclose to an applicant information

(a) that is available for purchase by the public, or

(b) that, within 60 days after the applicant's request is received, is to be published or released to the public.

(2) The head of a public body must notify an applicant of the publication or release of information that the head has refused to disclose under subsection (1) (b).

(3) If the information is not published or released within 60 days after the applicant's request is received, the head of the public body must reconsider the request as if it were a new request received on the last day of that period, but the information must not be refused under subsection (1) (b).

Disclosure harmful to business interests of a third party

21 (1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

(2) The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

(3) Subsections (1) and (2) do not apply if

(a) the third party consents to the disclosure, or

(b) the information is in a record that is in the custody or control of the British Columbia Archives and Records Service or the archives of a public body and that has been in existence for 50 or more years.

Disclosure harmful to personal privacy

22 (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable, and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

(d) the personal information relates to employment, occupational or educational history,

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax,

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

(h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

(i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or

(j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure,

(b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,

(c) an enactment of British Columbia or Canada authorizes the disclosure,

(d) the disclosure is for a research or statistical purpose and is in accordance with section 35,

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

(g) public access to the information is provided under the *Financial Information Act*,

(h) the information is about expenses incurred by the third party while travelling at the expense of a public body,

(i) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit, or

(j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (3) (c).

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

(6) The head of the public body may allow the third party to prepare the summary of personal information under subsection (5).

Division 3 ó Notice to Third Parties

Notifying the third party

23 (1) If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 21 or 22, the head must give the third party a written notice under subsection (3).

(2) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 21 or 22, the head may give the third party a written notice under subsection (3).

(3) The notice must

(a) state that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party,

(b) describe the contents of the record, and

(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.

(4) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that

(a) the record requested by the applicant contains information the disclosure of which may affect the interests or invade the personal privacy of a third party,

(b) the third party is being given an opportunity to make representations concerning disclosure, and

(c) a decision will be made within 30 days about whether or not to give the applicant access to the record.

Time limit and notice of decision

24 (1) Within 30 days after notice is given under section 23 (1) or (2), the head of the public body must decide whether or not to give access to the record or to part of the record, but no decision may be made before the earlier of

(a) 21 days after the day notice is given, or

(b) the day a response is received from the third party.

(2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision to

(a) the applicant, and

(b) the third party.

(3) If the head of the public body decides to give access to the record or to part of the record, the notice must state that the applicant will be given access unless the third party asks for a review under section 53 or 63 within 20 days after the day notice is given under subsection (2).

Division 4 ó Public Interest Paramount

Information must be disclosed if in the public interest

25 (1) Whether or not a request for access is made, the head of a public body must, without d[illegible] disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

(3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify

(a) any third party to whom the information relates, and

(b) the commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form

(a) to the last known address of the third party, and

(b) to the commissioner.

Part 3 ó Protection of Privacy

Division 1 ó Collection, Protection and Retention of Personal Information by Public Bodies

Purpose for which personal information may be collected

26 No personal information may be collected by or for a public body unless

(a) the collection of that information is expressly authorized by or under an Act,

(b) that information is collected for the purposes of law enforcement, or

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

How personal information is to be collected

27 (1) A public body must collect personal information directly from the individual the information is about unless

(a) another method of collection is authorized by

(i) that individual,

(ii) the commissioner under section 42 (1) (i), or

(iii) another enactment,

(b) the information may be disclosed to the public body under sections 33 to 36, or

(c) the information is collected for the purpose of

(i) determining suitability for an honour or award including an honorary degree, scholarship, prize or bursary,

(ii) a proceeding before a court or a judicial or quasi judicial tribunal,

(iii) collecting a debt or fine or making a payment, or

(iv) law enforcement.

(2) A public body must tell an individual from whom it collects personal information

(a) the purpose for collecting it,

(b) the legal authority for collecting it, and

(c) the title, business address and business telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.

(3) Subsection (2) does not apply if

(a) the information is about law enforcement or anything referred to in section 15 (1) or (2), or

(b) the minister responsible for this Act excuses a public body from complying with it because doing so would

(i) result in the collection of inaccurate information, or

(ii) defeat the purpose or prejudice the use for which the information is collected.

Accuracy of personal information

28 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must make every reasonable effort to ensure that the information is accurate and complete.

Right to request correction of personal information

29 (1) An applicant who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

(2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate the information with the correction that was requested but not made.

(3) On correcting or annotating personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year period before the correction was requested.

(4) On being notified under subsection (3) of a correction or annotation of personal information, a public body must make the correction or annotation on any record of that information in its custody or under its control.

Protection of personal information

30 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.

Retention of personal information

31 If a public body uses an individual's personal information to make a decision that directly affects the individual, the public body must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

Division 2 ó Use and Disclosure of Personal Information by Public Bodies

Use of personal information

32 A public body may use personal information only

(a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose (see section 34),

(b) if the individual the information is about has identified the information and has consented, in the prescribed manner, to the use, or

(c) for a purpose for which that information may be disclosed to that public body under sections 33 to 36.

Disclosure of personal information

33 A public body may disclose personal information only

(a) in accordance with Part 2,

(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to its disclosure,

(c) for the purpose for which it was obtained or compiled or for a use consistent with that purpose (see section 34),

(d) for the purpose of complying with an enactment of, or with a treaty, arrangement or agreement made under an enactment of, British Columbia or Canada,

(e) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information,

(f) to an officer or employee of the public body or to a minister, if the information is necessary for the performance of the duties of, or for the protection of the health or safety of, the officer, employee or minister,

(g) to the Attorney General for use in civil proceedings involving the government,

(h) to the Attorney General or a person referred to in section 36 of the *Coroners Act*, for the purposes of that Act,

(i) for the purpose of

(i) collecting a debt or fine owing by an individual to the government of British Columbia or to a public body, or

(ii) making a payment owing by the government of British Columbia or by a public body to an individual,

(j) to the auditor general or any other prescribed person or body for audit purposes,

(k) to a member of the Legislative Assembly who has been requested by the individual the information is about to assist in resolving a problem,

(l) to a representative of the bargaining agent who has been authorized in writing by the employee, whom the information is about, to make an inquiry,

(m) to the British Columbia Archives and Records Service, or the archives of a public body, for archival purposes,

(n) to a public body or a law enforcement agency in Canada to assist in an investigation

(i) undertaken with a view to a law enforcement proceeding, or

(ii) from which a law enforcement proceeding is likely to result,

(o) if the public body is a law enforcement agency and the information is disclosed

(i) to another law enforcement agency in Canada, or

(ii) to a law enforcement agency in a foreign country under an arrangement, written agreement, treaty or legislative authority,

(p) if the head of the public body determines that compelling circumstances exist that affect anyone's health or safety and if notice of disclosure is mailed to the last known address of the individual the information is about,

(q) so that the next of kin or a friend of an injured, ill or deceased individual may be contacted, or

(r) in accordance with sections 35 and 36.

Definition of consistent purposes

34 (1) A use of personal information is consistent under section 32 or 33 with the purposes for which the information was obtained or compiled if the use

(a) has a reasonable and direct connection to that purpose, and

(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.

(2) The minister responsible for this Act must publish annually a list of the consistent purposes for which personal information is used or disclosed.

Disclosure for research or statistical purposes

35 A public body may disclose personal information for a research purpose, including statistical research, only if

(a) the research purpose cannot reasonably be accomplished unless that information is provided in individually identifiable form or the research purpose has been approved by the commissioner,

(b) any record linkage is not harmful to the individuals that information is about and the benefits to be derived from the record linkage are clearly in the public interest,

(c) the head of the public body concerned has approved conditions relating to the following:

(i) security and confidentiality;

(ii) the removal or destruction of individual identifiers at the earliest reasonable time;

(iii) the prohibition of any subsequent use or disclosure of that information in individually identifiable form without the express authorization of that public body, and

(d) the person to whom that information is disclosed has signed an agreement to comply with the approved conditions, this Act and any of the public body's policies and procedures relating to the confidentiality of personal information.

Disclosure for archival or historical purposes

36 The British Columbia Archives and Record Service, or the archives of a public body, may disclose personal information for archival or historical purposes if

(a) the disclosure would not be an unreasonable invasion of personal privacy under section 22,

(b) the disclosure is for historical research and is in accordance with section 35,

(c) the information is about someone who has been dead for 20 or more years, or

(d) the information is in a record that has been in existence for 100 or more years.

Part 4 ó Office and Powers of Information and Privacy Commissioner

Appointment of commissioner

37 (1) On the recommendation of the Legislative Assembly, the Lieutenant Governor must appoint as the Information and Privacy Commissioner a person who has been unanimously recommended by a special Committee of the Legislative Assembly for the appointment.

(2) The commissioner is an officer of the Legislature.

(3) Subject to section 38, the commissioner holds office for a term of 6 years.

(4) A person who is appointed under this section is not eligible to be reappointed as commissioner.

Resignation, removal or suspension of commissioner

38 (1) The commissioner may resign at any time by notifying the Speaker of the Legislative Assembly or, if there is no speaker or the speaker is absent from British Columbia, by notifying the clerk of the Legislative Assembly.

(2) The Lieutenant Governor in Council must remove the commissioner from office or suspend the commissioner for cause or incapacity on the recommendation of 2/3 of the members present in the Legislative Assembly.

(3) If the Legislative Assembly is not sitting, the Lieutenant Governor in Council may suspend the commissioner for cause or incapacity.

Acting commissioner

39 (1) The Lieutenant Governor in Council may appoint an acting commissioner if

(a) the office of commissioner is or becomes vacant when the Legislative Assembly is not sitting,

(b) the commissioner is suspended when the Legislative Assembly is not sitting,

(c) the commissioner is removed or suspended or the office of the commissioner becomes vacant when the Legislative Assembly is sitting, but no recommendation is made by the Assembly under section 37 (1) before the end of the session, or

(d) the commissioner is temporarily absent because of illness or for another reason.

(2) An acting commissioner holds office until

(a) a person is appointed under section 37 (1),

(b) the suspension of the commissioner ends,

(c) the Legislative Assembly has sat for 20 days after the date of the acting commissioner's appointment, or

(d) the commissioner returns to office after a temporary absence,

whichever is the case and whichever occurs first.

Salary, expenses and benefits of commissioner

40 (1) A commissioner appointed under section 37 (1) or 39 (1) is entitled

(a) to be paid, out of the consolidated revenue fund, a salary equal to the salary paid to the chief judge of the Provincial Court, and

(b) to be reimbursed for reasonable travelling and out of pocket expenses personally incurred in performing the duties of the office.

(2) The Lieutenant Governor in Council may order that the *Pension (Public Service) Act* applies to the commissioner.

Staff of commissioner

41 (1) The commissioner may appoint, in accordance with the *Public Service Act,* employees necessary to enable the commissioner to perform the duties of the office.

(2) The commissioner may retain any consultants, mediators or other persons and may establish their remuneration and other terms and conditions of their retainers.

(3) The *Public Service Act* does not apply in respect of a person retained under subsection (2).

(4) The commissioner may make a special report to the Legislative Assembly if, in the commissioner's opinion,

(a) the amounts and establishment provided for the office of commissioner in the estimates, or

(b) the services provided by the Public Service Employee Relations Commission are inadequate for fulfilling the duties of the office.

General powers of commissioner

42 (1) In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

(a) conduct investigations and audits to ensure compliance with any provision of this Act,

(b) make an order described in section 58 (3) whether or not a review is requested,

(c) inform the public about this Act,

(d) receive comments from the public about the administration of this Act,

(e) engage in or commission research into anything affecting the achievement of the purposes of this Act,

(f) comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies,

(g) comment on the implications for access to information or for protection of privacy of automated systems for collection, storage, analysis or transfer of information,

(h) comment on the implications for protection of privacy of using or disclosing personal information for record linkage,

(i) authorize the collection of personal information from sources other than the individual the information is about, and

(j) bring to the attention of the head of a public body any failure to meet the prescribed standards for fulfilling the duty to assist applicants.

(2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that

(a) a duty imposed by this Act or the regulations has not been performed,

(b) an extension of time for responding to a request is not in accordance with section 10,

(c) a fee required under this Act is inappropriate,

(d) a correction of personal information requested under section 29 (1) has been refused without justification, and

(e) personal information has been collected, used or disclosed by a public body in contravention of Part 3.

Power to authorize a public body to disregard requests

43 If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

Powers of commissioner in conducting investigations, audits or inquiries

44 (1) In conducting an investigation under section 42 or an inquiry under section 56, the commissioner has the powers given to a commissioner by sections 15 and 16 of the *Inquiry Act* and the powers given by subsection (2) of this section.

(2) The commissioner may require any record to be produced to the commissioner and may examine any information in a record, including personal information.

(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

(4) If a public body is required to produce a record under subsection (1) or (2) and it is not practicable to make a copy of the record, the head of that public body may require the commissioner to examine the original at its site.

(5) After completing a review or investigating a complaint, the commissioner must return any record or any copy of any record produced by the public body concerned.

Statements made to the commissioner not admissible in evidence

45 (1) A statement made or an answer given by a person during an investigation or inquiry by the commissioner is inadmissible in evidence in court or in any other proceeding, except

(a) in a prosecution for perjury in respect of sworn testimony,

(b) in a prosecution for an offence under this Act, or

(c) in an application for judicial review or an appeal from a decision with respect to that application.

(2) Subsection (1) applies also in respect of evidence of the existence of proceedings conducted before the commissioner.

Protection against libel or slander actions

46 Anything said, any information supplied or any record produced by a person during an investigation or inquiry by the commissioner is privileged in the same manner as if the investigation or inquiry were a proceeding in a court.

Restrictions on disclosure of information by the commissioner and staff

47 (1) The commissioner and anyone acting for or under the direction of the commissioner must not disclose any information obtained in performing their duties, powers and functions under this Act, except as provided in subsections (2) to (5).

(2) The commissioner may disclose, or may authorize anyone acting on behalf of or under the direction of the commissioner to disclose, information that is necessary to

(a) conduct an investigation, audit or inquiry under this Act, or

(b) establish the grounds for findings and recommendations contained in a report under this Act.

(3) In conducting an investigation, audit or inquiry under this Act and in a report under this Act, the commissioner and anyone acting for or under the direction of the commissioner must take every reasonable precaution to avoid disclosing and must not disclose

(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 5, or

(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.

(4) The commissioner may disclose to the Attorney General information relating to the commission of an offence against an enactment of British Columbia or Canada if the commissioner considers there is evidence of an offence.

(5) The commissioner may disclose, or may authorize anyone acting for or under the direction of the commissioner to disclose, information in the course of a prosecution, application or appeal referred to in section 45.

Protection of commissioner and staff

48 No proceedings lie against the commissioner, or against a person acting on behalf of or under the direction of the commissioner, for anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty, power or function under this Part or Part 5.

Delegation by commissioner

49 (1) The commissioner may delegate to any person any duty, power or function of the commissioner under this Act, except

(a) the power to delegate under this section,

(b) the power to examine information described in section 12 (1) and (2) or 15 (Cabinet confidences and information harmful to law enforcement), and

(c) the duties, powers and functions specified in section 42 (1) (b), 43 or 58.

(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the commissioner considers appropriate.

Role of Ombudsman

50 The Ombudsman may not investigate any matter that the commissioner has the power to investigate or review under this Act unless the commissioner agrees.

Annual report of commissioner

51 (1) The commissioner must report annually to the Speaker of the Legislative Assembly on

(a) the work of the commissioner's office, and

(b) any complaints or reviews resulting from a decision, act or failure to act of the commissioner as head of a public body.

(2) The Speaker must lay each annual report before the Legislative Assembly as soon as possible.

Part 5 ó Reviews and Complaints

Division 1 ó Reviews by the Commissioner

Right to ask for a review

52 (1) A person who makes a request to the head of a public body, other than the commissioner, for access to a record or for correction of personal information may ask the commissioner to review any decision, act or failure to act of the head that relates to that request, including any matter that could be the subject of a complaint under section 42 (2).

(2) A third party notified under section 24 of a decision to give access may ask the commissioner toreview any decision made about the request by the head of a public body, other than the commissioner.

How to ask for a review

53 (1) To ask for a review under this Division, a written request must be delivered to the commissioner.

(2) A request for a review of a decision of the head of a public body must be delivered within

(a) 30 days after the person asking for the review is notified of the decision, or

(b) a longer period allowed by the commissioner.

(3) The failure of the head of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record, but the time limit in subsection (2) (a) for delivering a request for review does not apply.

Notifying others of review

54 On receiving a request for a review, the commissioner must give a copy to

(a) the head of the public body concerned, and

(b) any other person that the commissioner considers appropriate.

Mediation may be authorized

55 The commissioner may authorize a mediator to investigate and to try to settle a matter under review.

Inquiry by commissioner

56 (1) If the matter is not referred to a mediator or is not settled under section 55, the commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.

(2) An inquiry under subsection (1) may be conducted in private.

(3) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.

(4) The commissioner may decide

(a) whether representations are to be made orally or in writing, and

(b) whether a person is entitled to be present during or to have access to or to comment on representations made to the commissioner by another person.

(5) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review may be represented at the inquiry by counsel or an agent.

(6) An inquiry into a matter under review must be completed within 90 days after receiving the request for the review.

Burden of proof

57 (1) At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.

(2) However, if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

(3) At an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part.

Commissioner's orders

58 (1) On completing an inquiry under section 56, the commissioner must dispose of the issues by making an order under this section.

(2) If the inquiry is into a decision of the head of a public body to give or to refuse to give access to all or part of a record, the commissioner must, by order, do one of the following:

(a) require the head to give the applicant access to all or part of the record, if the commissioner determines that the head is not authorized or required to refuse access;

(b) either confirm the decision of the head or require the head to reconsider it, if the commissioner determines that the head is authorized to refuse access;

(c) require the head to refuse access to all or part of the record, if the commissioner determines that the head is required to refuse access.

(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following:

(a) require that a duty imposed by this Act or the regulations be performed;

(b) confirm or reduce the extension of a time limit under section 10;

(c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met;

(d) confirm a decision not to correct personal information or specify how personal information is to be corrected;

(e) require a public body to stop collecting, using or disclosing personal information in contravention of this Act;

(f) require the head of a public body to destroy personal information collected in contravention of this Act.

(4) The commissioner may specify any terms or conditions in an order made under this section.

(5) The commissioner must give a copy of an order made under this section to all of the following:

(a) the person who asked for the review;

(b) the head of the public body concerned;

(c) any person given notice under section 54;

(d) the minister responsible for this Act.

Duty to comply with orders

59 (1) Not later than 30 days after being given a copy of an order of the commissioner, the head of the public body concerned must comply with the order unless an application for judicial review of the order is brought before that period ends.

(2) If an application for judicial review is brought before the end of the period referred to in subsection (1), the order of the commissioner is stayed from the date the application is brought until a court orders otherwise.

Division 2 ó Complaints About and Reviews of Decisions on Information in the Commissioner's Records

Adjudicator to investigate complaints and review decisions

60 (1) The Lieutenant Governor in Council may designate a person who is a judge of the Supreme Court to act as an adjudicator and

(a) to investigate complaints made against the commissioner as head of a public body with respect to any matter referred to in section 42 (2), and

(b) to review, if requested under section 62, any decision, act or failure to act of the commissioner as head of a public body.

(2) An adjudicator may retain the services of any persons necessary to assist the adjudicator in performing his or her functions under this Act.

(3) The government may pay out of the consolidated revenue fund,

(a) to an adjudicator, the expenses a judge is entitled to receive under section 57 (3) of the *Judges Act* (Canada) while acting as an adjudicator, and

(b) to a person whose services are retained under subsection (2), remuneration for those services.

Powers, duties and protections of adjudicator

61 (1) For the purposes of section 60, an adjudicator has the powers, duties and functions given to the commissioner by sections 42 (2) (a) to (d), 43, 44 and 47 (1), (2) (a) and (3) to (5).

(2) Sections 45, 46, 48 and 50 apply for the purposes of an investigation, inquiry or review by an adjudicator.

Right to ask for a review

62 (1) A person who makes a request to the commissioner as head of a public body for access to a record or for correction of personal information may ask an adjudicator to review any decision, act or failure to act of the commissioner that relates to the request, including any matter that could be the subject of a complaint under section 42 (2) (a) to (d).

(2) A third party notified under section 24 of a decision to give access may ask an adjudicator to review any decision made about the request by the commissioner as head of a public body.

How to ask for a review

63 (1) To ask for a review under this Division, a written request must be delivered to the minister responsible for this Act.

(2) A request for a review of a decision of the commissioner must be delivered within

(a) 30 days after the person asking for the review is notified of the decision, or

(b) a longer period allowed by the adjudicator.

(3) Section 53 (3) applies if the commissioner fails to respond in time to a request for access to a record.

Notifying others of review

64 On receiving a request for a review, the minister responsible for this Act must promptly forward the request to an adjudicator and must give a copy to

(a) the commissioner, and

(b) any other affected person.

Conduct and outcome of the review

65 (1) An adjudicator has the powers and duties given to the commissioner by sections 55 and 56 (1) and (2), and sections 56 (3) to (6) and 57 apply to an inquiry conducted by the adjudicator.

(2) On completing an inquiry, an adjudicator has the same duty to dispose of the issues, the same powers to make orders and the same duty to notify others of those orders, as the commissioner has under section 58 (1), (2), (3) (a) to (d), (4) and (5).

(3) Section 59 applies to an order of an adjudicator.

Part 6 ó General Provisions

Delegation by the head of a public body

66 (1) The head of a public body may delegate to any person any duty, power or function of the head of the public body under this Act, except the power to delegate under this section.

(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the head of the public body considers appropriate.

(3) This section does not apply to a local public body.

Consultative committee

67 The minister responsible for this Act may establish a consultative committee to make recommendations to the minister about the operation of this Act.

Annual report of minister

68 The minister responsible for this Act must prepare an annual report on its administration and lay the report before the Legislative Assembly as soon as possible.

Freedom of information directory

69 (1) The minister responsible for this Act must publish a directory to assist in identifying and locating records.

(2) The directory must include

(a) a description of the mandate and functions of each public body and its components,

(b) a description of the records in the custody or under the control of each public body,

(c) a list of the records in the custody or under the control of the public body,

(d) a subject index, and

(e) the title, business address and business telephone number of the head of the public body.

(3) The directory must include, for each personal information bank, the following:

(a) its title and location;

(b) a description of the kind of personal information and the categories of individuals whose personal information is included;

(c) the authority for collecting the personal information;

(d) the purposes for which the personal information was obtained or compiled and the purposes for which it is used or disclosed;

(e) the categories of persons who use the personal information or to whom it is disclosed.

(4) If personal information is used or disclosed by a public body for a purpose that is not included in the directory published under subsection (1), the head of the public body must

(a) keep a record of the purpose and either attach or link the record to the personal information,

(b) promptly notify the minister responsible for this Act of the purpose, and

(c) ensure that the purpose is included in the next publication of the directory.

(5) Subsections (2) (c), (3) and (4) do not apply in respect of a local public body.

(6) The head of a local public body must make available for inspection and copying by the public a directory that lists the local public body's personal information banks and includes, for each bank, the information specified in subsection (3) (a) to (c).

(7) The minister responsible for this Act must

(a) provide copies of the directory to public bodies and to public libraries and other prescribed libraries in British Columbia, and

(b) publish and distribute, at intervals of 2 years or less, supplements or replacements to keep the directory up to date.

(8) The head of a public body must ensure that copies provided under subsection (7) are available to the public at an office of the public body.

Policy manuals available without request

70 (1) The head of a public body must make available to the public, without a request for access under this Act,

(a) manuals, instructions or guidelines issued to the officers or employees of the public body, or

(b) substantive rules or policy statements adopted by the public body,

for the purpose of interpreting an enactment or of administering a program or activity that affects the public or a specific group of the public.

(2) The head of a public body may delete from a record made available under this section any information he or she would be entitled to refuse to disclose to an applicant.

(3) If information is deleted, the record must include a statement of

(a) the fact that information has been deleted,

(b) the nature of the information, and

(c) the reason for the deletion.

(4) If a person asks for a copy of a record under this section, section 71 (2) applies.

Records available without request

71 (1) The head of a public body may prescribe categories of records that are in the custody or under the control of the public body and are available to the public, on demand, without a request for access under this Act.

(2) The head of a public body may require a person who asks for a copy of an available record to pay a fee to the public body.

(3) Subsection (1) does not limit the discretion of the government of British Columbia or a public body to release records that do not contain personal information.

Public record index

72 (1) To assist in disseminating information to the public, the minister responsible for this Act must publish annually an index of records that are available to the public under section 71.

(2) The index must include, for each category of records prescribed by the head of a public body under section 71, the following:

(a) a description of the mandate and functions of the public body;

(b) a description of all records in that category produced or obtained by the public body during the past 12 months;

(c) the location of the records;

(d) the title, business address and business telephone number of an officer or employee of the public body who can answer questions about the records.

(3) The minister responsible for this Act must provide copies of the index to public bodies and to public libraries and other prescribed libraries in British Columbia.

(4) The head of a public body must ensure that copies provided under subsection (3) are available to the public at an office of the public body.

Protection of public body from legal suit

73 No action lies and no proceeding may be brought against the government, a public body, the head of a public body, an elected official of a public body or any person acting on behalf of or under the direction of the head of a public body for damages resulting from

(a) the disclosure, or failure to disclose, in good faith of all or part of a record under this Act or any consequences of that disclosure or failure to disclose, or

(b) the failure to give any notice required under this Act if reasonable care is taken to give the required notice.

Offences and penalties

74 (1) A person must not willfully do any of the following:

(a) make a false statement to, or mislead or attempt to mislead, the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;

(b) obstruct the commissioner or another person in the performance of the duties, powers or functions of the commissioner orother person under this Act;

(c) fail to comply with an order made by the commissioner under section 58 or by an adjudicator under section 65 (2).

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine of up to $5 000.

(3) Section 5 of the *Offence Act* does not apply to this Act.

Fees

75 (1) The head of a public body may require an applicant who makes a request under section 5 to pay to the public body fees for the following services:

(a) locating, retrieving and producing the record;

(b) preparing the record for disclosure;

(c) shipping and handling the record;

(d) providing a copy of the record.

(2) An applicant must not be required under subsection (1) to pay a fee for

(a) the first 3 hours spent locating and retrieving a record, or

(b) time spent severing information from a record.

(3) Subsection (1) does not apply to a request for the applicant's own personal information.

(4) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.

(5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,

(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or

(b) the record relates to a matter of public interest, including the environment or public health or safety.

(6) The fees that prescribed categories of applicants are required to pay for services under subsection (1) may differ from the fees other applicants are required to pay for them, but may not be greater than the actual costs of the services.

Power to make regulations

76 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(a) prescribing procedures to be followed in making, transferring and responding to requests under this Act;

(b) permitting prescribed categories of applicants to make requests under this Act orally instead of in writing;

(c) setting standards, including time limits, to be observed by officers or employees of a public body in fulfilling the duty to assist applicants;

(d) prescribing for the purposes of section 18 the categories of sites that are considered to have heritage or anthropological value;

(e) authorizing the disclosure of information relating to the mental or physical health of individuals to medical or other experts to determine, for the purposes of section 19, if disclosure of that information could reasonably be expected to result in grave and immediate harm to the safety of or the mental or physical health of those individuals;

(f) prescribing procedures to be followed or restrictions considered necessary with respect to the disclosure and examination of information referred to in paragraph (e);

(g) prescribing special procedures for giving individuals access to personal information about their mental or physical health;

(h) prescribing the classes of individuals who may act for minors, incompetents, deceased persons or any other individuals under this Act and regulating the manner in which, and the extent to which, any rights or powers of individuals under this Act may be exercised on their behalf;

(i) requiring public bodies to provide to the minister responsible for this Act information that relates to its administration or is required for preparing the minister's annual report, the freedom of information directory or the public record index;

(j) limiting the fees that different categories of persons are required to pay under this Act;

(k) exempting any class of public body from a regulation made under this subsection;

(l) authorizing, for the purposes of section 12 (3) and (4), a local public body to hold meetings of its elected officials, or of its governing body or a committee of the governing body, to consider specified matters in the absence of the public unless another Act

(i) expressly authorizes the local public body to hold meetings in the absence of the public, and

(ii) specifies the matters that may be discussed at those meetings;

(m) providing for the retention and disposal of records by a public body if the *Document Disposal Act* does not apply to the public body;

(n) for any purpose contemplated by this Act.

(3) The Lieutenant Governor in Council may amend, by regulation, Schedule 2

(a) to add to it any agency, board, commission or other body

(i) any member of which is appointed by the Lieutenant Governor in Council or a minister,

(ii) a controlling interest in the share capital of which is owned by the government of British Columbia or any of its agencies, or

(iii) that performs functions under an enactment, and

(b) to designate or change the designation of the head of a public body.

(4) The Lieutenant Governor in Council may amend, by regulation, Schedule 3 to add to it the name of the governing body of a profession or occupation if

(a) any member of that body is appointed by the Lieutenant Governor in Council, a minister or an Act, or

(b) the profession or occupation is governed under an Act.

(5) A regulation made under subsection (1) or (2) may provide differently for different classes of public bodies.

Power to make bylaws

77 A local public body, by bylaw or other legal instrument by which the local public body acts,

(a) must designate a person or group of persons as the head of the local public body for the purposes of this Act,

(b) may authorize any person to perform any duty or exercise any function under this Act of the person or group of persons designated as the head of the local public body, and

(c) may set any fees the local public body requires to be paid under section 75.

Appropriation

78 In the absence of an appropriation for the purpose under another Act, expenditures incurred in connection with the administration of this Act may be paid out of the consolidated revenue fund.

Relationship of Act to other Acts

79 If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

Review of Act

80 A special committee of the Legislative Assembly must begin a comprehensive review of this Act by October 4, 1997 and must submit to the Legislative Assembly, within one year after beginning the review, a report that includes any amendments recommended by the committee.

Right to disclose preserved

81 A public body that, before October 4, 1993, disclosed names, addresses and drivers' licence numbers to the Tuberculous and Chest Disabled Veterans' Association may continue, despite section 33, to disclose that information to the association if it undertakes not to use the information except for the purposes for which it used that information before that date.

Schedule 1

(Note: see section 1)

Definitions

In this Act:

"aboriginal government" means an aboriginal organization exercising governmental functions;

"adjudicator" means a person designated under section 60;

"commissioner" means the commissioner appointed under section 37 (1) or 39 (1);

"educational body" means

(a) a university as defined in the *University Act*,

(b) the University of Northern British Columbia,

(c) Royal Roads University,

(c.1) Technical University of British Columbia,

(d) an institution as defined in the *College and Institute Act*,

(e) the British Columbia Institute of Technology continued under the *Institute of Technology Act*,

(f) the Open Learning Agency established under the *Open Learning Agency Act*,

(g) a board as defined in the *School Act*, or

(h) a francophone education authority as defined in the *School Act*;

"employee", in relation to a public body, includes a person retained under a contract to perform services for the public body;

"exercise of prosecutorial discretion" means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power

(a) to approve or not to approve a prosecution,

(b) to stay a proceeding,

(c) to prepare for a hearing or trial,

(d) to conduct a hearing or trial,

(e) to take a position on sentence, and

(f) to initiate an appeal;

"head", in relation to a public body, means

(a) if the public body is a ministry or office of the government of British Columbia, the member of the Executive Council who presides over it,

(b) if the public body is designated in, or added by regulation to, Schedule 2, the person designated as the head of that public body in that Schedule or by regulation, and

(c) in any other case, the person or group of persons designated under section 77 as the head of the public body;

"health care body" means

(a) a hospital as defined in section 1 of the *Hospital Act*,

(b) a Provincial auxiliary hospital established under the *Hospital (Auxiliary) Act*,

(c) a regional hospital district and a regional hospital district board under the *Hospital District Act,*

(d) a local board of health as defined in the *Health Act,*

(e) a metropolitan board of health established under the *Health Act,*

(f) a Provincial mental health facility as defined in the *Mental Health Act,*

(g) a regional health board designated under section 4 (1) of the *Health Authorities Act,* or

(h) a community health council designated under section 6 (1) of the *Health Authorities Act;*

"judicial administration record" means a record containing information relating to a judge, master or a justice of the peace, including

(a) scheduling of judges and trials,

(b) content of judicial training programs,

(c) statistics of judicial activity prepared by or for a judge, and

(d) a record of the judicial council of the Provincial Court;

"law enforcement" means

(a) policing, including criminal intelligence operations,

(b) investigations that lead or could lead to a penalty or sanction being imposed, or

(c) proceedings that lead or could lead to a penalty or sanction being imposed;

"local government body" means

(a) a municipality as defined in the *Municipal Act* or the *Resort Municipality of Whistler Act,*

(b) the City of Vancouver,

(c) a regional district as defined in the *Municipal Act,*

(d) an improvement district as defined in the *Municipal Act,*

(e) a local area as defined in the *Local Services Act,*

(f) a greater board as defined in the *Municipal Act* or any incorporated board that provides similar services and is incorporated by letters patent,

(g) a board of variance established under section 899 of the *Municipal Act* or section 572 of the *Vancouver Charter,*

(h) the trust council, the executive committee, a local trust committee and the trust fund board, as these are defined in the *Islands Trust Act,*

(i) the Okanagan Basin Water Board,

(j) a water users' community as defined in the *Water Act,*

(k) the Okanagan-Kootenay Sterile Insect Release Board,

(l) a municipal police board established under section 23 of the *Police Act,*

(m) a library board as defined in the *Library Act,*

(n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and all the members or officers of which are appointed or chosen by or under the authority of that body,

(o) a board of cemetery trustees established under section 18 of the *Cemetery and Funeral Services Act, or*

(p) the Greater Vancouver Transportation Authority;

"local public body" means

(a) a local government body,

(b) a health care body,

(c) an educational body, or

(d) a governing body of a profession or occupation, if the governing body is designated in, or added by regulation to, Schedule 3;

"minister responsible for this Act" means the member of the Executive Council charged by order of the Lieutenant Governor in Council with the administration of this Act;

"officer of the Legislature" means the Auditor General, the Child, Youth and Family Advocate, the Commissioner appointed under the *Members' Conflict of Interest Act,* the police complaint commissioner appointed under Part 9 of the *Police Act,* the Information and Privacy Commissioner, the Chief Electoral Officer or the Ombudsman;

"personal information" means recorded information about an identifiable individual, including

(a) the individual's name, address or telephone number,

(b) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,

(c) the individual's age, sex, sexual orientation, marital status or family status,

(d) an identifying number, symbol or other particular assigned to the individual,

(e) the individual's fingerprints, blood type or inheritable characteristics,

(f) information about the individual's health care history, including a physical or mental disability,

(g) information about the individual's educational, financial, criminal or employment history,

(h) anyone else's opinions about the individual, and

(i) the individual's personal views or opinions, except if they are about someone else;

"personal information bank" means a collection of personal information that is organized or retrievable by the name of an individual or by an identifying number, symbol or other particular assigned to an individual;

"prosecution" means the prosecution of an offence under an enactment of British Columbia or Canada;

"public body" means

(a) a ministry of the government of British Columbia,

(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, or

(c) a local public body

but does not include

(d) the office of a person who is a member or officer of the Legislative Assembly, or

(e) the Court of Appeal, Supreme Court or Provincial Court;

"record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

"third party", in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than

(a) the person who made the request, or

(b) a public body;

"trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that

(a) is used, or may be used, in business or for any commercial advantage,

(b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,

(c) is the subject of reasonable efforts to prevent it from becoming generally known, and

(d) the disclosure of which would result in harm or improper benefit.

Schedule 2

(Note: see Schedule 1, definitions of "head" and "public body")

Public Bodies

Public Body: Adoption Agency licensed under the *Adoption Act*
Head: Administrator
Public Body: Advisory Committee to the Medical Services Commission
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Appeal Boards (*Forest Act* and *Range Act*) (each Board)
Head: Minister of Forests
Public Body: Aquaculture Industry Advisory Board
Head: Minister of Agriculture, Fisheries and Food
Public Body: Assessment Committee (*Mental Health Act*)
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Audit Committee (*Medical Service Act*)
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Auditor Certification Board
Head: Minister of Finance and Corporate Relations
Public Body: B.C. Mushroom Marketing Board
Head: Chair
Public Body: B.C. Pavilion Corporation
Head: Chair of the Board of Directors
Public Body: Blueberry Industry Development Council
Head: Chair

Public Body: Board of Brand Commissioners
Head: Minister of Agriculture, Fisheries and Food
Public Body: Board of Examiners (Education)
Head: Minister of Education, Skills and Training
Public Body: Board of Examiners (Municipal Affairs)
Head: Minister of Municipal Affairs and Housing
Public Body: Boards of Cemetery Trustees (each Board)
Head: Attorney General
Public Body: Boards of Reference (each Board)
Head: Minister of Education, Skills and Training
Public Body: British Columbia Agricultural Industry Development Council
Head: Chair
Public Body: British Columbia Arts Board
Head: Chair
Public Body: British Columbia Assessment Authority
Head: Chair of the Board of Directors
Public Body: British Columbia Board of Parole
Head: Chair
Public Body: British Columbia Broiler Hatching Egg Commission
Head: Chair
Public Body: British Columbia Buildings Corporation
Head: Chair of the Board of Directors
Public Body: British Columbia Chicken Marketing Board
Head: Chair
Public Body: British Columbia Community Pride Program
Head: Minister of Small Business, Tourism and Culture
Public Body: British Columbia Council on Admissions and Transfer
Head: Minister of Education, Skills and Training
Public Body: British Columbia Courthouse Library Society
Head: Chair
Public Body: British Columbia Cranberry Marketing Board
Head: Chair
Public Body: British Columbia Egg Marketing Board
Head: Chair
Public Body: British Columbia Ferry Corporation
Head: Chair of the Board of Directors
Public Body: British Columbia Festival of the Arts Society

Head: Minister of Small Business, Tourism and Culture
Public Body: British Columbia Film Development Society
Head: Chair
Public Body: British Columbia Forest Museum
Head: Minister of Small Business, Tourism and Culture
Public Body: ritish Columbia Forest Research Advisory Committee
Head: Minister of Forests
Public Body: British Columbia Game Farm Advisory Council
Head: Minister of Agriculture, Fisheries and Food
Public Body: British Columbia Gaming Commission
Head: Chair
Public Body: British Columbia Grape Marketing Board
Head: Chair
Public Body: British Columbia Health Research Foundation
Head: Chair
Public Body: British Columbia Heritage Trust
Head: Chair
Public Body: British Columbia Hog Marketing Commission
Head: Chair
Public Body: British Columbia Housing and Employment Development Financing Authority
Head: Minister of Finance and Corporate Relations
Public Body: British Columbia Housing Management Commission
Head: Chair
Public Body: British Columbia Human Rights Commission
Head: Chief Commissioner
Public Body: British Columbia Human Rights Tribunal
Head: Chair
Public Body: British Columbia Hydro and Power Authority
Head: Chair of the Board of Directors
Public Body: British Columbia Investment Management Corporation
Head: Chief Investment Officer
Public Body: British Columbia Lottery Corporation
Head: Chair of the Board of Directors
Public Body: British Columbia Marketing Board
Head: Chair
Public Body: British Columbia Milk Marketing Board
Head: Chair

Public Body:	British Columbia Oyster Board
Head:	Chair
Public Body:	British Columbia Peace River Grain Development Council
Head:	Chair
Public Body:	British Columbia Racing Commission
Head:	Chair
Public Body:	British Columbia Review Board
Head:	Chair
Public Body:	British Columbia Round Table on the Environment and the Economy
Head:	Minister of Environment, Lands and Parks
Public Body:	British Columbia Salmon Marketing Council
Head:	Chair
Public Body:	British Columbia Securities Commission
Head:	Chair
Public Body:	British Columbia Sheep and Wool Commission
Head:	Chair
Public Body:	British Columbia Sport and Recreation Advisory Council
Head:	Minister of Small Business, Tourism and Culture
Public Body:	British Columbia Steamship (1975) Ltd.
Head:	President
Public Body:	British Columbia Student Assistance Appeals Committee
Head:	Minister of Education, Skills and Training
Public Body:	British Columbia Summer and Winter Games Society
Head:	Minister of Small Business, Tourism and Culture
Public Body:	British Columbia Systems Corporation
Head:	Chair of the Board of Directors
Public Body:	British Columbia Trade Development Corporation
Head:	Director of the Corporation
Public Body:	British Columbia Transit Corporation
Head:	Chair of the Board of Directors
Public Body:	British Columbia Tree Fruit Marketing Board
Head:	Chair
Public Body:	British Columbia Turkey Marketing Board
Head:	Chair
Public Body:	British Columbia Utilities Commission
Head:	Chair
Public Body:	British Columbia Vegetable Marketing Commission

Head: Chair
Public Body: British Columbia Wine Institute
Head: Chair
Public Body: British Columbia Year of Music
Head: Minister of Finance and Corporate Relations
Public Body: British Columbia Youth Council
Head: Minister of Education, Skills and Training
Public Body: Building Code Appeal Board
Head: Minister of Municipal Affairs and Housing
Public Body: Building Safety Advisory Council
Head: Minister of Municipal Affairs and Housing
Public Body: Building Safety Standards Advisory Council
Head: Minister of Municipal Affairs and Housing
Public Body: Bull Control Committees (each Committee)
Head: Minister of Agriculture, Fisheries and Food
Public Body: Cattle Industry Development Board
Head: Chair
Public Body: Chip Export Advisory Committee
Head: Minister of Forests
Public Body: Class "C" Provincial Park Boards (each Board)
Head: Minister of Environment, Lands and Parks
Public Body: C.M.A. Parking Association
Head: Minister of Environment, Lands and Parks
Public Body: Commercial Appeals Commission
Head: Chair
Public Body: Commission on Resources and Environment
Head: Commissioner
Public Body: Commissions of Inquiry (each Commission)
Head: Chair
Public Body: Committee of Special Advisors (*Labour Relations Code*)
Head: Minister of Labour
Public Body: Committee on Public Participation in Science and Technology
Head: Minister of Employment and Investment
Public Body: Compensation Fairness Commission
Head: Minister of Finance and Corporate Relations
Public Body: Construction Industry Advisory Council
Head: Minister of Labour

Public Body: Credit Union Deposit Insurance Corporation of British Columbia
Head: Chair
Public Body: Creston Valley Wildlife Management Authority
Head: Minister of Environment, Lands and Parks
Public Body: Criminal Injury Compensation Section of the Workers' Compensation Board
Head: Chair
Public Body: Criminal Record Check Appeal Panel
Head: Chair
Public Body: Crop Insurance Advisory Committees (each Committee)
Head: Minister of Agriculture, Fisheries and Food
Public Body: Downtown Revitalization Program Society
Head: Minister of Municipal Affairs and Housing
Public Body: Duke Point Developments
Head: Chair
Public Body: Education Advisory Council
Head: Minister of Education, Skills and Training
Public Body: Elections British Columbia
Head: Chief Electoral Officer
Public Body: Electoral Boundaries Commission
Head: Chair
Public Body: Electrical Safety Advisory Committee
Head: Minister of Municipal Affairs and Housing
Public Body: Electrical Safety Appeal Board
Head: Minister of Municipal Affairs and Housing
Public Body: Electrical Safety Board of Review
Head: Minister of Municipal Affairs and Housing
Public Body: Elevating Devices Appeal Board
Head: Minister of Municipal Affairs and Housing
Public Body: Elevating Devices Safety Advisory Committee
Head: Minister of Municipal Affairs and Housing
Public Body: Emergency Communications Corporation under the *Emergency Communications Corporations Act*
Head: General Manager or President (as applicable)
Public Body: Emergency Health Services Commission
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Emergency Medical Assistants Licensing Board
Head: Minister of Health and Minister Responsible for Seniors

Public Body: Environmental Appeal Board
Head: Chair
Public Body: Expropriation Compensation Board
Head: Chair
Public Body: Financial Institutions Commission
Head: Chair
Public Body: Fire Code Committee
Head: Minister of Municipal Affairs and Housing
Public Body: Fire Safety Advisory Council
Head: Minister of Municipal Affairs and Housing
Public Body: Fire Services Advisory Board
Head: Minister of Municipal Affairs and Housing
Public Body: First Nations Forestry Council
Head: Minister of Forests
Public Body: First Peoples' Heritage, Language and Culture Advisory Committee
Head: Minister of Aboriginal Affairs
Public Body: First Peoples' Heritage, Language and Culture Council
Head: Minister of Aboriginal Affairs
Public Body: Fisheries Renewal BC
Head: Chair
Public Body: Forensic Psychiatric Services Commission
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Forest Appeals Commission
Head: Chair
Public Body: Forest Land Reserve Commission
Head: Chair
Public Body: Forest Practices Advisory Council
Head: Chair
Public Body: Forest Research Council
Head: Minister of Forests
Public Body: Forest Resource Commission
Head: Minister of Forests
Public Body: Forest Sector Strategy Committee
Head: Minister of Forests
Public Body: Friends of Barkerville Society
Head: Chair
Public Body: Friends of Fort Steele Society

Head: Chair
Public Body: Gas Safety Advisory Committee
Head: Minister of Municipal Affairs and Housing
Public Body: Gas Safety Appeal Board
Head: Minister of Municipal Affairs and Housing
Public Body: Habitat Conservation Fund Public Advisory Board
Head: Minister of Environment, Lands and Parks
Public Body: Health Facilities Association of British Columbia
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Health Professions Council
Head: Chair
Public Body: Homeowner Protection Office
Head: Chief Executive Officer
Public Body: Hospital Appeal Board (*Hospital Act*)
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Hospitals Foundation of British Columbia
Head: Chair
Public Body: Human Rights Advisory Council
Head: Minister of Government Services and Minister Responsible for Multiculturalism, Human Rights, Sports and Immigration
Public Body: Income Assistance Advisory Council
Head: Minister of Human Resources
Public Body: Independent Schools Teacher Certification Committee
Head: Minister of Education, Skills and Training
Public Body: Industrial Inquiry Commissions (each Commission)
Head: Minister of Labour
Public Body: Industry Training and Apprenticeship Commission
Head: Chair
Public Body: Insurance Corporation of British Columbia
Head: President and Chief Executive Officer
Public Body: Insurance Council of British Columbia
Head: Chair
Public Body: International Financial Centre Vancouver Society
Head: Minister of Employment and Investment
Public Body: International Maritime Centre ó Vancouver Society
Head: Minister of Employment and Investment
Public Body: Job Protection Commission
Head: Minister of Economic Development, Small Business and Trade

Public Body: Justice Development Commission
Head: Chair
Public Body: Kilby Museum Historic Society
Head: Chair
Public Body: Labour Relations Board
Head: Chair
Public Body: Law Reform Commission
Head: Chair
Public Body: Legal Services Society
Head: Chair
Public Body: Liquor Appeal Board
Head: Chair
Public Body: Mediation and Arbitration Board
Head: Minister of Employment and Investment
Public Body: Medical Review Board
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Medical Review Panels (*Workers Compensation Act*) (each Panel)
Head: Minister of Labour
Public Body: Medical Services Commission
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Mineral Tax Review Board
Head: Minister of Employment and Investment
Public Body: Minister's European Community Advisory Committee
Head: Minister of Employment and Investment
Public Body: Motion Picture Appeal Board
Head: Chair
Public Body: Motor Carrier Commission
Head: Chair
Public Body: Muskwa-Kechika Advisory Board
Head: Chair
Public Body: Native Courtworkers and Counselling Association of British Columbia
Head: President
Public Body: North America Free Trade Advisory Committee
Head: Minister of Employment and Investment
Public Body: Notaries Public, Board of Examiners
Head: Chair

Public Body: Office of the Auditor General

Head: Auditor General

Public Body: Office of the Commissioner appointed under the *Members' Conflict of Interest Act*

Head: Commissioner

Public Body: Office of the Information and Privacy Commissioner

Head: Commissioner

Public Body: Office of the Northern Development Commissioner

Head: Northern Development Commissioner

Public Body: Office of the Ombudsman

Head: Ombudsman

Public Body: Office of the police complaint commissioner appointed under the *Police Act*

Head: Police complaint commissioner

Public Body: Office of the Premier and Executive Council Operations

Head: Premier

Public Body: Office of the Public Trustee

Head: Public Trustee

Public Body: Oil and Gas Commission

Head: Commissioner

Public Body: Okanagan Valley Tree Fruit Authority

Head: Chair of the Board of Directors

Public Body: Order of British Columbia Advisory Council

Head: Chair

Public Body: Pacific National Exhibition

Head: President

Public Body: Pacific Rim Institute of Tourism

Head: Minister of Small Business, Tourism and Culture

Public Body: Pension Benefits Standards Advisory Council

Head: Minister of Labour

Public Body: Pharmacare Advisory Committee

Head: Minister of Health and Minister Responsible for Seniors

Public Body: Plain Language Institute of British Columbia Society

Head: Chair

Public Body: Plumbing Code Advisory Committee

Head: Minister of Municipal Affairs and Housing

Public Body: Power Engineers and Pressure Vessel Safety Advisory Committee

Head: Minister of Municipal Affairs and Housing
Public Body: Power Engineers and Pressure Vessel Safety Appeal Board
Head: Minister of Municipal Affairs and Housing
Public Body: Premier's Advisory Council for Persons with Disabilities
Head: Minister of Education, Skills and Training
Public Body: Premier's Advisory Council on Science and Technology
Head: Minister of Employment and Investment
Public Body: Private Investigators and Security Agencies Advisory Board
Head: Chair
Public Body: Private Post Secondary Education Commission
Head: Chair
Public Body: Property Assessment Appeal Board
Head: Chair
Public Body: Property Assessment Review Panels (each Panel)
Head: Minister of Municipal Affairs
Public Body: Provincial Adult Care Facilities Licensing Board
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Provincial Advisory Committee on Services to Adults with a Mental Handicap
Head: Minister for Children and Families
Public Body: Provincial Agricultural Land Commission
Head: Chair
Public Body: Provincial Capital Commission
Head: Chair
Public Body: Provincial Child Care Council
Head: Minister for Children and Families
Public Body: Provincial Child Care Facilities Licensing Board
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Provincial Rental Housing Corporation
Head: Minister of Municipal Affairs and Housing
Public Body: Provincial Tourist Advisory Council
Head: Minister of Small Business, Tourism and Culture
Public Body: Public Documents Committee
Head: Minister of Employment and Investment
Public Body: Public Interest Inquiry Boards (each Board)
Head: Minister of Labour
Public Body: Public Service and Public Sector Inquiry Commission
Head: Minister of Employment and Investment

Public Body: Public Service Appeal Board
Head: Chair
Public Body: Purchasing Commission
Head: Minister of Finance and Corporate Relations
Public Body: Raspberry Industry Development Council
Head: Chair
Public Body: Real Estate Foundation of British Columbia
Head: Chair
Public Body: Regional Advisory Committees (each Committee)
Head: Chair
Public Body: Regional Advisory Councils on Services to Adults with a Mental Handicap (each Council)
Head: Minister for Children and Families
Public Body: Review Panels (*Mental Health Act*)
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Science Council of British Columbia
Head: Minister of Employment and Investment
Public Body: Seed Control Committees (each Committee)
Head: Minister of Agriculture, Fisheries and Food
Public Body: Seed Potato Control Committees (each Committee)
Head: Minister of Agriculture, Fisheries and Food
Public Body: Seniors Advisory Council
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Skagit Environmental Endowment Commission
Head: Minister of Environment, Lands and Parks
Public Body: Special Advisory Committee on Ethical Issues in Health Care
Head: Minister of Health and Minister Responsible for Seniors
Public Body: Standing Committee on Student Financial Assistance
Head: Minister of Education, Skills and Training
Public Body: Superannuation Commission
Head: Minister of Finance and Corporate Relations
Public Body: Terry Fox Medical Research Foundation
Head: Minister of Finance and Corporate Relations
Public Body: The ICA Foundation of British Columbia
Head: Attorney General
Public Body: Timber Export Advisory Committee
Head: Minister of Forests
Public Body: Tourism British Columbia

Head: Chair

Public Body: Travel Assurance Board

Head: Attorney General

Public Body: Treasury Advisory Board

Head: Minister of Finance and Corporate Relations

Public Body: TRIUMF-KAON Venture Office Advisory Board

Head: Minister of Employment and Investment

Public Body: Victoria Rediscovery Society

Head: Minister of Small Business, Tourism and Culture

Public Body: Victoria Regional Transit Commission

Head: Chair

Public Body: Vocational Rehabilitation of Disabled Persons Appeal Secretariat

Head: Minister of Education, Skills and Training

Public Body: Whistler Land Corporation Development Ltd.

Head: Minister of Finance and Corporate Relations

Public Body: Workers' Compensation Board

Head: Chair of the Board of Governors

Public Body: Workers' Compensation Review Board

Head: Chair

Public Body: Youth Program Committee

Head: Chair

Schedule 3

Governing Bodies of Professions or Occupations

Applied Science Technologists and Technicians of British Columbia

Architectural Institute of British Columbia

Association of British Columbia Professional Foresters

Association of Naturopathic Physicians of British Columbia

Association of Physiotherapists and Massage Practitioners of British Columbia

Association of Professional Engineers and Geoscientists of the Province of British Columbia

Barbers' Association of British Columbia

Board of Registration for Social Workers

British Columbia Association of Optometrists

British Columbia Association of Podiatrists

British Columbia College of Chiropractors

British Columbia Institute of Agrologists

British Columbia Registered Music Teachers' Association

British Columbia Society of Landscape Architects

British Columbia Veterinary Medical Association

Building Officials' Association of British Columbia

Certified General Accountants' Association of British Columbia

College of Dental Surgeons of British Columbia

College of Pharmacists of British Columbia

College of Physicians and Surgeons of British Columbia

College of Psychologists of British Columbia

College of Teachers

Corporation of Land Surveyors of British Columbia

Council of Licensed Practical Nurses

Dental Technicians and Denturists Board

Hairdressers' Association of British Columbia

Health Professions Council

Institute of Chartered Accountants of British Columbia

Law Society of British Columbia

Real Estate Council

Registered Nurses' Association of British Columbia

Registered Psychiatric Nurses Association of British Columbia

Society of Management Accountants of British Columbia

Society of Notaries Public of British Columbia

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[Full Listing | A | B | C | D | E | F | G | H | I | J | L | M | N | O | P | Q | R | S | T | U | V | W | Y]

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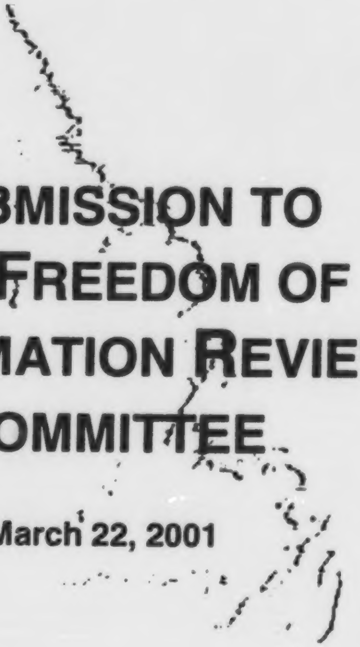
2. Newfoundland & Labrador Centre for Health Information

Newfoundland & Labrador
Centre for
Health Information



SUBMISSION TO THE FREEDOM OF INFORMATION REVIEW COMMITTEE

March 22, 2001

8th Floor, Southcott Hall
100 Forest Road
St. John's, NF
A1A 1E5

Phone: 777-7537
Fax: 777-7129
E-mail: lucym@nlchi.nf.ca
Web Site: www.nlchi.nf.ca

Newfoundland & Labrador
Centre for
Health Information

Newfoundland and Labrador Centre for Health Information

Submission to

The Freedom of Information Review Committee

March 22, 2001

Introduction

The Newfoundland and Labrador Centre for Health Information (NLCHI) is pleased that the Freedom of Information Review Committee has been established to review the existing legislation affecting the flow of information held by government and its agencies. As the Centre progresses in meeting its mandate increasing amounts of personal health information will be electronically by the health boards and other authorized trustees. The people of Newfoundland and Labrador must be assured that their personal information will be accessible to them upon request and protected against unauthorized use. This can only be achieved through the enforcement of strong freedom of information and privacy legislation.

Through its extensive review of the privacy and confidentiality protections for personal health information, NLHCI is concerned that existing legislation is inadequate to ensure the protection of information on the Health Information Network. Strong legislation with clear consequences for failure to comply will assure the public that personal health information is protected and that agencies that are trustees of personal information will have clear accountability standards.

Individuals should have the comfort of knowing that they can control their personal health information, and that only they can authorize its release, outside of statutory requirements. They should also have the guarantee that if their privacy is violated there is a clear means of redress that is provided through legislation. Such legislation would also set out the responsibilities of those who collect, use and disclose the information. An updated Privacy Act could provide these assurances. As well, individuals should have the right of access, through the Freedom of Information Act, to obtain information about themselves that is collected and used by governments and its agencies.

This submission will comment primarily on the release of personal information held by the government and its agencies covered by the Freedom of Information Act (FOI) and on the best method of ensuring compliance. The release of personal health information held in the hospitals is governed by The Hospitals Act, one of the acts the committee should review for consistency with any new proposals for FOI.

Newfoundland and Labrador Centre for Health Information

NLCHI was created in October 1996 to develop a province-wide comprehensive and integrated information network to enable the collection, use and disclosure of health information for the benefit of patients and clients, the management of the health system, and health research. A comprehensive network is one in which all key service providers establish and manage their own information systems. An integrated network is one that allows information systems to communicate and be linked with each other when required.

The Centre is governed by a volunteer Board of Management (see Appendix A) representing several of the key stakeholders in the HIN. The Board of Management reports to the Board of Trustees of the Health Care Corporation of St. John's. NLCHI has 15 staff members working in its office located in St. John's, and three staff members working out of satellite offices around the province. The responsibilities of the Centre include the development of the HIN, promoting standards in the collection, recording and use of health information, and the release of information which will help in the planning and management of the health system.

The Board of Management sees as one of the central tenets of its mandate the duty to ensure that the Health Information Network and the information systems of the stakeholders foster and protect an individual's right to privacy. This must be balanced with the mandate of the NLCHI to provide information that will assist individuals, communities, service providers and policy makers to make informed decisions, which enhance health and well being (seeVision, Mandate and Values, Appendix B).

NLCHI has worked closely with stakeholders in the health system to identify key issues that must be addressed before the stakeholders and the public will accept the HIN. The Board of Management has identified the protection of personal health information as the key issue in achieving its overall objectives and one on which a consensus must be reached with stakeholders, including the public and the Government of Newfoundland and Labrador.

NLCHI established a standing committee of the Board in 1997, to consider how personal health information exchanged through the HIN could best be protected. Through the work of this committee, and with input from many stakeholders, the Board of Management in September 1999 approved the Privacy, Confidentiality and Access Standards (Appendix C) to be used by the organizations managing an information system that is part of the HIN. Subsequently, NLCHI has also participated with the Department of Health and Community Services on developing a policy framework for the protection of personal health information.

The committee continued its work in 2000 by drafting a mandate for a permanent review tribunal within the NLCHI structure to mediate situations involving issues of privacy and confidentiality that cannot be resolved by the participants in the HIN and to approve record linkages for secondary use (Appendix D). This document too was circulated to stakeholders for comment. All stakeholder responses support the need for such an entity to monitor compliance, receive complaints and approve secondary uses of personal health information not consented to by the individual. Secondary uses of information include all uses that are not directly related to the primary treatment and care of the individual.

Protection of Privacy and Freedom of Information

NLCHI strongly supports the work of the Freedom of Information Committee but is concerned that the mandate of the Committee addresses only part of the issue. When the present Freedom of Information Act was passed in 1981 it was accompanied by the Privacy Act. The Privacy Act of Newfoundland provides for the privacy of the individual but not information about the individual, it is in need of extensive updating to reflect today's electronic environment. A new privacy act should establish the rules for the collection, use and disclosure of personal information by the government and its agencies. The Freedom of Information Act governs the disclosure or release of information, which is why these Acts should continue to be companion pieces of legislation. In this submission, NLCHI has restricted its comments primarily to the FOI except when privacy legislation is required to support it.

The purpose of freedom of information legislation is to promote open government through the public's access to information about the decisions and actions of the government and its agencies. In addition, the government and its agencies are the largest holders of personal information in Canadian society. The Freedom of Information Act must include the individual's right of access to all information the government holds about him or her. If the individual determines that some of the information is incorrect that individual should be allowed to amend it. This principle of access to information is one of the 10 principles of the Canadian Standards Association's *Model Code for the Protection of Personal Information*, the *Protection of Personal Information and Electronic Documents Act*, and privacy legislation in other Canadian provinces. It is a principle that should also be included in Freedom of Information legislation in this Province.

The purpose of the FOI legislation should include restricting the disclosure of personal information to individuals and organizations that are authorized to use the information. This authorization should only be available from the person whom the information is about or by legislation. Further, this information shall only be collected from the individual and not a third party except in legislated circumstances. Both disclosure and collection are CSA principles, which should be included in FOI legislation and re-enforced through privacy legislation.

The government and other public bodies share personal information without informing the public of these activities. NLCHI suggests that legislation should require all departments of government and all public bodies to make public lists of all classifications of information, and in particular, the agreements and memorandums of understanding that allow for the sharing of personal information. This list of classifications should be made available on the government web site and in public libraries.

Government and public bodies should all be required to work towards implementation of electronic audit trails of all individuals accessing personal information. If personal information is held in a paper file, it must be required that all people accessing the file sign it out. Should an individual request access to information about him or herself, the release of the information should include a copy of the audit trail whether created electronically or a photocopy of the sign-out sheet in the paper file, plus a list of all programs and organizations with whom the information has been shared. This requirement should also be part of privacy legislation.

Personal Information in the Health System

Government and its agencies are the largest holders of personal information and in this role they are known as trustees. The health boards, although considered a agencies of the government, are legislated under The Hospitals Act on the rules of release of personal information. There is, however, only a minor penalty for the unauthorized disclosure of personal health information. (It is not uncommon in the legislation protecting personal health information in other provinces to see fines of $50,000 for an individual convicted of an offence.)

The Committee should consider establishing guidelines on restrictions of release of personal information for use by trustees of personal information. In this regard the definition in the Act of personal information and the forms in which it may be held should be updated to reflect today's standards. Inclusion of a penalty for the unauthorized access and disclosure of personal information by trustees and their employees in any revisions to the legislation would enhance the public's confidence in the Act. Through the enactment of freedom of information legislation and legislation protecting personal information the citizens of Newfoundland and Labrador can be more confident that their information is protected from misuse regardless of which public body holds it and that there are consequences for offences under the Acts

Review Mechanism

Freedom of information legislation elsewhere includes an entity to provide advice to the government and its agencies, to monitor compliance and to disclose access to information activities. NLCHI wishes the Committee to consider the need for a similar mechanism to monitor privacy activities in this Province. The Centre has requested that the Minister of Health and Community Services proceed with legislation to protect personal health information in the not too distant future.

The Centre recognizes the difficulty in striking a balance between providing access to information and protecting it from unauthorized disclosure. As identified previously, the Center's mandate includes both protection of personal information and access to information for secondary purposes. NLCHI has identified three review mechanism that could be used by the Government.

1. Office of Ombudsman and Review Commissioner.
2. Office of the Information Commissioner. This office would be responsible for Freedom of Information and Privacy and it would be separate from the Ombudsman
3. Three separate offices for the Ombudsman, Freedom of Information Commissioner and Privacy Commissioner

NLCHI considers that each option has its own weaknesses and strengths. By separating the three offices the responsibility of each commissioner/ombudsman would be clearly defined. There could, however, potentially be problems of primacy and there would be less likelihood of finding the balance between access and privacy. By combining the roles of an information commissioner and privacy commissioner the balance is more likely to be achieved, but the Office would act as both investigator and judge on issues of privacy. The first option puts an extraordinary amount of quasi-judicial authority in one office. NLCHI would like to see an Assistant Commissioner for Health Information as has been proposed in the Ontario' Personal Health Information Privacy Act, 2000.

The commissioner(s) should be appointed by the House of Assembly and report back annually. The responsibilities of the commissioner(s) should be defined as to receive complaints, investigate and audit compliance with the Freedom of Information Act, and other appropriate legislation and report to the Legislative Assembly and to the public of government departments and its agencies that do not comply with the legislation. In the absence of binding powers to enforce, the Commissioner must be given authority to disclose any breaches of the legislation.

In NLCHI's draft mandate for a review tribunal for personal health information it proposes several responsibilities for the body. This Review Committee should include similar responsibilities for any review mechanism they recommend in their final report. The review body should be authorized to monitor and consider the following:

- disclosure of personal information from one government department or public body to another;
- preventing "function creep" where trustees of databases identify additional uses of the personal information which have not been consented to by the individual and are not consistent with the original purpose for the collection of the information;
- requests for linking or matching of databases of personal information for secondary uses of that information, and for the requests for bulk data from public registries; and
- privacy impacts of the creation of all new databases of personal information.

NLCHI also suggests that the commissioner or assistant commissioner responsible for health information be a permanent member of the proposed provincial ethics review board for medical research. The protection of the privacy and confidentiality of personal information of research participants will be a key responsibility of the ethics review board.

Other Issues

The FOI Review Committee should identify all legislative exceptions to the rules of disclosure. The use of legislative authority is often used to justify "function creep".

NLCHI is concerned that the cost of accessing personal information by an individual, particularly in the health system is a deterrent to some people. Each board has set its own fee schedule as allowed under The Hospitals Act.

Conclusion

The Newfoundland and Labrador Centre for Health Information thanks the Freedom of Information Review Committee for this opportunity to present its views on how important freedom of information and privacy legislation are for this Province, and the future operation of the Centre. At the present time Newfoundland and Labrador falls short of the national standard on both these legislative initiatives, whereas in 1980 the province was one of the leaders.

The Newfoundland and Labrador Centre for Health Information would be pleased to discuss its work in the area of privacy of health information further with the Committee at the Committee's convenience.

Appendices

A. Members of the Newfoundland and Labrador Centre for Health Information Board of Management.
B. Newfoundland and Labrador Centre for Health Information's Vision, Mandate and Values
C. Privacy, Confidentiality and Access Standards, NLCHI, 1999
D. Mandate and Implementation of the Review Tribunal, NLCHI, 2000, Draft

APPENDIX A

NEWFOUNDLAND AND LABRADOR
CENTRE FOR HEALTH INFORMATION

BOARD OF MANAGEMENT

NAME	REPRESENTING
Mr. Andrew Grant *Board Chairman*	
Mr. Jerry Vink *Vice-Chairman*	NF-Labrador Human Rights Association
Mr. William Fanning	Consumer/Business
Mr. Fred Cahill	Consumer/Business Private Business
Mr. Derrick Sturge	Consumer/Business
Ms. Janice Cooper	Consumer/Business
Ms. Donna Brewer	Department of Health & Community Services
Mr. David Roberts	Department of Human Resources & Employment
Dr. Gerard Farrell	NF & Labrador Medical Association
Ms. Heather Hawkins	Association of Registered Nurses of NF
Dr. Carl Robbins	Memorial University of Newfoundland, Medical School
Mr. Robert Peddigrew	Newfoundland Medical Care Commission
Jim Wolstenholme	NF & Labrador Health & Community Services Boards
VACANT	NF & Labrador Health & Community Services Boards
Mr. Keith Healey	Department of Industry, Trades & Technology
Ms. Brenda Caul	Treasury Board
Mr. Donald F. Rowe	Newfoundland Pharmaceutical Association
VACANT	Health Care Corporation of St. John's
Mr. Steve O'Reilly *Chief Executive Officer*	NF & Labrador Centre for Health Information

March 22, 2001

APPENDIX B

VISION, MANDATE AND VALUES STATEMENTS

VISION

We assist individuals, communities, service providers and policy makers to make informed decisions which enhance health and well being.

MANDATE

Working in partnership with service providers, government, consumers, researchers and the private sector, the Newfoundland and Labrador Centre for Health Information is responsible for the development of an information system for the province which is:

- confidential and secure
- comprehensive, integrating data from all components of the health and social sectors
- accurate and up-to date
- flexible and responsive to changing user requirements
- accessible by all authorized users
- efficient and cost effective

The Centre has responsibility to provide leadership in the development and implementation of standards and guidelines which will enhance the quality of information and the security of the system. This includes adherence to national and international data standards and to promoting their adoption within the province and across the country.

VALUES

In achieving its mission and in support of its vision, the Centre is guided by the following values:

- A commitment to improve the overall wellbeing of the residents of this province through the development of a health information system.

- Respect for the confidential nature of information gathered and safeguarding the privacy rights of individuals;

- A belief in the right of individuals to have access to their health information and for groups, agencies and communities to have a means of access to information which can assist them in making informed decisions;

- A commitment to educating our stakeholders and the people of the province regarding the importance of health information, its security and how it can be accessed and used;

- A spirit of respect and responsiveness to stakeholders' needs and fairness in our dealings with them;

- Responsibility for insuring that the products we develop are of high quality and are useful tools for informed decision-making and for promoting this value with our suppliers and clients;

- Accountability to our stakeholders, primarily the population of the province, for the effective and efficient use of our human and financial resources;

- A commitment to respond in a dynamic, creative and effective manner to a changing environment, through an ongoing program of professional development, research and quality improvement initiatives;

- A commitment to become a Centre of Excellence in the development and application of information systems technology in the health and social sectors.

December 15, 1997
Revised – March 14, 2001

APPENDIX C

Newfoundland and Labrador Centre for Health Information

Privacy, Confidentiality and Access Standards

August 1999

Prepared by the
Privacy Advisory Group
of the Communications Committee

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INTRODUCTION

The Privacy, Confidentiality and Access Standards (NLCHI Standards) and their accompanying guidelines were developed by an advisory committee of the Board of Management of the Newfoundland and Labrador Centre for Health Information.

The committee consisted of members of the Board as well as staff and persons from the community with special expertise in the field of privacy protection.

Board Members
Jerry Vink, Chair
Executive Director
Newfoundland and Labrador Human Rights Association

Donald Rowe
Registrar
Newfoundland Pharmaceutical Association

Dr. Gerard Farrell
Newfoundland Cancer Treatment and Research Foundation

Heather Hawkins
Registrar
Association of Registered Nurses of Newfoundland

Community Members
Lois Hoegg
Ches Crosbie & Associates
Canadian Bar Association

Peter Browne
Curtis Dawe
Canadian Bar Association

Past Committee Member
Donald Keats
Chief Executive Officer
Central West Health Corporation

Staff
Sandra Cotton
Director – Standards Development
Newfoundland and Labrador Centre for Health Information

Don MacDonald
Health Consultant
Newfoundland and Labrador Centre for Health Information

Lucinda McDonald
Director of Communications
Newfoundland and Labrador Centre for Health Information

The process used to develop the NLCHI Standards, as well as the Preamble and Glossary, was an extensive, and at times difficult, activity. The starting point was the adoption of the ***Model Code for the Protection of Personal Information*** developed by the Canadian Standards Association. The committee added one new standard and adapted the guidelines to make them appropriate to the situation in this province. During this process, the committee members provided various perspectives to reflect the concerns of their respective constituencies.

The working draft was presented to the NLCHI Board of Management and, with their approval, was subsequently circulated to selected stakeholder groups to solicit their input. Amendments and changes were then made to the draft, and the final product was resubmitted to the Board of Management. They subsequently mandated the committee to do a province-wide consultation to solicit suggestions, feedback and recommendations. Once these responses have been evaluated and used for refining the NLCHI Standards, they will be resubmitted to the Board for their final approval and adoption.

It is important to note that it is virtually impossible to develop guidelines that are tailor-made for every conceivable situation. It is, therefore, important to use the principles defined in the Preamble as a means to interpret the standards and guidelines in the policy.

It is the intention of the Newfoundland and Labrador Centre for Health Information that the NLCHI Standards become the basis on which all participants in the Health Information Network (HIN) will act in regards to privacy, confidentiality and access.

Preamble

The Newfoundland and Labrador Centre for Health Information (NLCHI) was created in October 1996 to develop a province-wide comprehensive and integrated information network. A comprehensive network is one in which all key service providers establish and manage their own information systems. An integrated network is one that allows information systems to communicate and be linked with each other when required.

In keeping with the intention of the government in establishing the NLCHI, its Board of Management, in consultation with various stakeholders, including the public, is mandated to work in partnership with service providers, government, consumers and the private sector.

> *The Newfoundland and Labrador Centre for Health Information is responsible for the development of an information system for the province which is:*
>
> - *confidential and secure*
> - *comprehensive, integrating data from all components of the service sectors*
> - *accurate and up-to-date*
> - *flexible and responsive to changing user requirements*
> - *accessible by all authorized users*
> - *efficient and cost-effective*

A central tenet of this mandate is to ensure that the Health Information Network (HIN) and the information systems of the stakeholders foster and protect each individual's right to privacy.

We believe the right to privacy is one of the cornerstones of a free and democratic society. Once this fundamental human right, guaranteed in the *Canadian Charter of Rights and Freedoms* and various international instruments to which Canada is a signatory, is compromised, it is difficult to regain. Therefore, the NLCHI is committed to protecting the right to privacy, and to requiring all users of the Health Information Network to comply with the NLCHI Standards.

To ensure adequate protection of privacy, all institutions, community health organizations, associations, and individuals who want to use the services of the NLCHI and the information systems that are linked under its mandate must agree to abide by the standards defined in this document.

The NLCHI Standards are based on a number of shared beliefs, which include the following:

- **The right to privacy**. This right is fundamental to any consideration and interpretation of the NLCHI Standards, and the work of the NLCHI and those who use its services. Privacy is not an absolute. In certain situations it may not be desirable, practical or even possible to adhere to it strictly. Even when it cannot be adhered to rigorously, this standard must still function as a guiding norm.

- **The need-to-know**. Protection of privacy is enhanced when information is restricted to those who have a need that can be demonstrated and which is based on reasonable and rational justifications. All decisions about the release of information must be governed by this fundamental concept.

- **Good Faith**. Consultation among professionals is a complex process often based on informal communication conducted in good faith. However, the use of information must be guided at all times by professionalism and respect.

- **Private and Small Practices**. While large organizations and individuals in private or small group practices share the same responsibilities for adhering to the NLCHI Standards, there are differences between the resources each can bring to bear to fulfill these responsibilities. Where the demands of the NLCHI Standards place an unreasonable administrative burden on private practitioners or small office practices, recognized professional bodies may provide standardized policies, practices and procedures to assist members of the profession in meeting the standards outlined in this document.

- **Identifiable and non-identifiable information**. Information can be directed into three categories:
    - Identifiable information is personal information which is, or could be, associated with an individual;
    - Non-identifiable information is general information which is not specific to an individual, including information on diseases, treatment and services; and
    - Information that is non-identifiable, but person-specific such that it can become identifiable.

  The rigid standards to ensure privacy will not be applied to general, non-identifiable information. However, the NLCHI will establish rigorous criteria for making data non-identifiable, and strict guidelines on what qualifies as non-identifiable information.

- **Research.** Access to information by researchers, including the use of historical data, must be balanced with the need to maintain privacy and confidentiality of the information.

- **Review Body.** It is anticipated there will be a wide range of participating organizations and service providers in the HIN. As well, there will be a vested interest by the public in the efficient and fair delivery of service and the protection of confidentiality. This may lead to situations where mediation of disagreements will be required. The NLCHI Board of Management will establish an impartial review committee to consider situations which cannot be resolved by the participants (1.4 and 10.5). The review committee will also be authorized to approve record linkage studies for secondary use (5.8; 5.12.3; 5.12.6).

  The exact format and mandate of the review committee will be determined and, if necessary, amended at the discretion of the NLCHI Board of Management. The Board will also retain the power of appeal in those instances where the resolution of issues cannot be attained by the review committee.

List of Standards

STANDARD 1 – ACCOUNTABILITY

An organization and/or individual service provider is accountable for personal identifiable information under its/his/her control and shall designate an individual or individuals to be accountable for the organization's or service provider's compliance with the standards adopted by the Newfoundland and Labrador Centre for Health Information.

STANDARD 2 – IDENTIFYING PURPOSES

The purposes for which personal identifiable information is collected shall be identified by the organization or service provider at or before the time the information is collected.

STANDARD 3 – CONSENT

Informed consent of the individual is required for the collection, use, or disclosure of personal identifiable information, except where required by law.

STANDARD 4 – COLLECTION

The primary purpose of the collection of personal identifiable information is to benefit the individual who permits information to be collected. Collection for legitimate secondary use shall be restricted to what is necessary and shall not impede the giving or collection of information for the primary purpose.

STANDARD 5 – USE, DISCLOSURE, ACCESS AND RETENTION

The primary purpose of the use, disclosure, access and retention of personal identifiable information is to benefit the individual who permits information to be collected. Use, disclosure or access for legitimate secondary purposes shall be restricted to what is necessary and shall not impede the giving or collection of information for the primary purpose.

STANDARD 6 – ACCURACY AND INTEGRITY

The accuracy and integrity of personal identifiable information are necessary to support the individual's right to privacy and to meet the requirements for its collection, use or disclosure.

STANDARD 7 – SECURITY

Personal identifiable information shall be protected by security safeguards appropriate to the information and against unintended or unauthorized access, use, or intrusion, or such dangers as accidental loss or destruction.

STANDARD 8 – OPENNESS OF POLICIES, PROCEDURES AND PRACTICES

An organization or service provider shall make readily available to individuals specific information about the policies, procedures and practices relating to the management of personal identifiable information. Individuals must be able to clearly understand the extent and circumstances of the collection, use and disclosure of their personal identifiable information.

STANDARD 9 – INDIVIDUAL ACCESS

Individuals have the right of access to their personal identifiable information. Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal identifiable information and shall be given access to that information. In rare and limited circumstances, withholding personal identifiable information from an individual is permissible if disclosure may have a significant likelihood of substantial adverse effect on the physical, mental or emotional health of the individual or a third party. The onus lies on the service provider to justify to the individual a denial of access. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

STANDARD 10 – CHALLENGING COMPLIANCE

Individuals must be informed and understand that the organization's or service provider's policies, procedures and practices are open to scrutiny and challenge. An individual shall be able to address a challenge concerning compliance with the above standards to the designated individual or individuals accountable for the organization's or service provider's compliance.

STANDARD 11 – OWNERSHIP OF INFORMATION

Individuals are the owners of any and all personal identifiable information pertaining to them regardless of where it is held.

STANDARD 1 – ACCOUNTABILITY

An organization and/or individual service provider is accountable for personal identifiable information under its/his/her control and shall designate an individual or individuals to be accountable for the organization's or service provider's compliance with the Standards adopted by the Newfoundland and Labrador Centre for Health Information.

Guidelines

1.1 Policies and procedures set by the organization or service provider to ensure compliance with this Standard must reflect the direct accountability of service providers and organizations owed to the individual.

1.2 Service providers and trustees:

- are accountable for the security of all personal identifiable information;
- must ensure that only authorized staff have access to personal identifiable information and only as necessary to fulfill authorized purposes;
- must inform anyone with access to personal identifiable information of their responsibility to protect personal identifiable information. They must agree to accept those responsibilities and recognize that appropriate sanctions for failing to protect confidentiality will be enforced;
- must designate a person to be responsible and accountable for monitoring and ensuring internal compliance with this Standard. The designated person shall have the autonomy, authority and resources necessary to ensure adherence to the Standard.

1.3 Service providers and trustees shall develop and implement policies, procedures and practices that give effect to this Standard, including those that:

- protect the security of personal identifiable information;
- receive and respond to complaints and inquiries;
- ensure persons who collect, use or disclose personal identifiable information are held accountable to the designated person(s) responsible for monitoring compliance on behalf of the organization and ultimately the review body established by the NLCHI; and
- ensure that individuals are adequately informed about the collection of their personal identifiable information and that their informed consent is sought and obtained.

STANDARD 2 – IDENTIFYING PURPOSES

The purposes for which personal identifiable information is collected shall be identified by the organization or service provider at or before the time the information is collected.

Guidelines

2.1 The identification of the purpose for which information is collected is the foundation for informed consent.

2.2 Personal identifiable information must only be used for the purposes identified to the individual at or before the time it is confided or collected.

2.3 A service provider or trustee must ensure individuals are provided information about the uses to which their personal data will be applied. This includes:

- the information disclosed will become part of their electronic record;
- the reasonably foreseeable purposes for secondary use;
- other individuals, groups or organizations who may have access to, collect, use or disclose information as it pertains to the primary purpose.

2.4 In the field of health care, personal information is also collected for the prevention, treatment or management of symptoms of disease. Personal information may be collected for reasons other than direct individual care, including:

- public health;
- resource planning;
- quality assurance;
- research; and
- legal requirements.

STANDARD 3 – CONSENT

Informed consent of the individual is required for the collection, use, or disclosure of personal identifiable information, except where required by law.

Guidelines

3.1 Consent or choice as to who has access to one's information is a fundamental component of privacy. To be meaningful, consent must be informed and voluntary, and not obtained through misrepresentation or fraud. The individual must also be competent to understand what their consent entails. A statement in clear and simple language about how the information will be used or disclosed is required to obtain informed consent.

3.2 In emergency care situations, consent for the collection, use or disclosure of personal identifiable information may be implied. This implied consent must be consistent with legislation governing emergency care.

3.3 Implied consent does not deprive the individual of the right to refuse consent or subsequently challenge the service provider's assumption of implied consent.

3.4 In non-emergency situations, implied consent for the collection, use or disclosure of personal identifiable information is only permitted where specifically authorized by appropriate legislation such as the *Schools Act*, the *Social Services Act* or the *Medical Care Plan Act*.

3.5 There may be other situations where an individual may be unable to give informed consent, and these situations are governed by law.

3.6 Where disclosure of personal identifiable information is mandated by law, individuals shall be informed such disclosure has occurred. The individual shall be informed of the group or individual achieving access and the law under which access was granted.

3.7 Consent is required for access to identifiable information about individual service providers except where required by law. Information collected shall be restricted to that which relates to the services provided by the individual. All other identifiable information intended for secondary uses shall be released only with the consent of the individual service provider.

3.8 Identifiable information about individual institutions shall not be protected from disclosure. Exceptions may exist where this information would reveal the identity of individual clients or service providers, consistent with the *Statistics Act of Canada*.

3.9 An individual has the right to refuse consent.

STANDARD 4 – COLLECTION

The primary purpose of the collection of personal identifiable information is to benefit the individual who permits information to be collected. Collection for legitimate secondary use shall be restricted to what is necessary and shall not impede the giving or collection of information for the primary purpose.

Guidelines

4.1 Collection of personal identifiable information for the primary purpose may be as extensive as necessary.

4.2 Personal identifiable information collection for the secondary purpose shall be as minimal as necessary, in recognition of the need to protect theindividual's right to privacy.

4.3 Collection of personal identifiable information without individual consent shall only occur in limited circumstances as provided:

- when required by law; or
- when ordered by a court of law.

4.4 The need to collect specific types of personal identifiable information will vary with the service provider, the setting, and the condition being managed.

4.5 Personal identifiable information shall not be collected by means that are unlawful, unfair or exploit the individual's vulnerability. Nor shall any of the individual's beliefs or potentially false expectations about subsequent collection, use, disclosure or access be exploited.

4.6 Provided the Standards in this document are adhered to, personal identifiable information may be collected for the following purposes:

4.6.1 The primary purpose is the initial reason for the individual seeking or receiving services as it pertains to the delivery of a service to a particular individual with respect to an immediate need or problem.

4.6.2 The primary purpose may also be to develop composite information, such as a detailed medical or social service history, about a particular individual. This composite would enhance ongoing services to that individual beyond the direct application to any particular or immediate need or problem.

4.6.3 The secondary purpose is the collection of personal identifiable information required or permitted by legislation or regulation. It may also be for such purposes as education or research not governed by legislation, that meets the following criteria:

- collection must be restricted to what is necessary for the identified purpose(s) and must not intrude upon the primary purpose(s);
- all reasonable steps must be taken to make personal identifiable information anonymous;

- if it has been demonstrated that making personal identifiable information anonymous renders it inadequate for legitimate users, the information must be collected and stored in a de-identified re-linkable format;
- the purpose must not be applied retroactively to existing personal identifiable information unless individual consent is given.

STANDARD 5 – USE, DISCLOSURE, ACCESS AND RETENTION

The primary purpose of the use, disclosure, access and retention of personal identifiable information is to benefit the individual who permits information to be collected. Use, disclosure or access for legitimate secondary purposes shall be restricted to what is necessary and shall not impede the giving or collection of information for the primary purpose.

Guidelines

5.1 Personal identifiable information use, disclosure, access and retention for the primary purpose may be as extensive as necessary.

5.2 Personal identifiable information use, disclosure or access for the secondary purpose shall be as minimal as necessary, in recognition of the need to protect the individual's right to privacy.

5.3 Personal identifiable information use, disclosure or access without individual consent shall occur only in limited circumstances as provided:

- when required by law;
- when ordered by a court of law; or
- when approved by the review body.

5.4 The need for specific types of personal identifiable information will vary with the service provider, the setting, and the condition being managed. Each organization must have policies on specific access privileges based on the NLCHI Standards.

5.5 Users of personal identifiable information may want to have access to personal identifiable information for purposes other than those for which the information was originally gathered. The default assumption is that there is no access to personally identifiable information without the consent of the individual, and that access is on a "need-to-know" basis.

5.6 Trustees of information systems which link several databases must implement systems of control over appropriate access or disclosure.

5.7 The NLCHI's review body will approve record linkage studies for secondary use on a case-by-case basis *before they are conducted*, particularly if the records to be linked are in the custody of different institutions. In such cases, it will be determined which trustee will conduct the linkage and under what circumstances. A contract between the trustee(s) and the requesting party(ies) must explicitly detail responsibilities and accountability.

5.8 The linkages between records need to be transparent. Upon request, individuals must be informed of the linkages of their personal identifiable information, by whom, and for what purposes.

5.9 Personal identifiable information shall be retained as long as necessary to fulfill its primary or secondary purpose, or as required by law.

5.10 Service providers and trustees shall have policies for the destruction of personal identifiable information.

5.11 Provided the Standards in this document are adhered to, personal identifiable information may be used, disclosed or accessed for the following purposes:

5.11.1 The primary purpose is the initial reason for the individual seeking or receiving services, as it pertains to the delivery of a service to a particular individual with respect to an immediate need or problem.

5.11.2 The primary purpose may also be to develop composite information, such as a detailed medical or social service history, about a particular individual. This composite would enhance ongoing services to that individual beyond the direct application to any particular or immediate need or problem.

5.11.3 The secondary purpose is the use or disclosure of personal identifiable information required or permitted by legislation or regulation. It may also be for such purposes as education or research not governed by legislation, but approved by the review body.

Use and Disclosure for Research

5.12 A trustee may use or disclose personal identifiable information for research purposes with the express consent of the individual if:

5.12.1 The research purposes cannot reasonably be accomplished using de-identified personal information;

5.12.2 Reasonable steps are taken to protect the privacy of the individual by removing as much identifiable information as is practical in the circumstances;

5.12.3 In the opinion of the review body, the research project is not contrary to the public interest;

5.12.4 The research project has been approved by a research ethics committee to the satisfaction of the review body;

5.12.5 The person who is to receive the personal health information enters into an agreement with the trustee which details:

5.12.5.1 that the person who is to receive the information will ensure that the information will be used or disclosed only for the purposes set out in the agreement;

5.12.5.2 that the person who is receiving the information will take reasonable steps to ensure the security and confidentiality of the information;

5.12.5.3 when the person who is to receive the information must return to the trustee any original records or copies of records containing personal identifiable information, or destroy any copies of records made by the researcher.

5.12.6 Where it is not reasonable for the consent of an individual to be obtained, the review body may use or disclose personal identifiable information for research purposes if the review body considers the potential benefits of the research project clearly outweigh the potential risk to the privacy of the individual.

STANDARD 6 – ACCURACY AND INTEGRITY

The accuracy and integrity of personal identifiable information are necessary to support the individual's right to privacy and to meet the requirements for its collection, use or disclosure.

Guidelines

6.1 Personal identifiable information shall be as accurate, complete and current as possible for authorized purposes.

6.2 The service provider is responsible for the accurate recording of information.

6.3 Trustees must protect the integrity of the information in their custody and have assurance that the integrity of information received from, or passed onto, other trustees has been, and will continue to be, similarly safeguarded.

STANDARD 7 - SECURITY

Personal identifiable information shall be protected by security safeguards appropriate to the information and against unintended or unauthorized access, use, or intrusion, or such dangers as accidental loss or destruction.

Guidelines

7.1 Organizations and service providers shall have procedures to protect data integrity and security, including physical, organizational and technical measures.

7.2 Security safeguards shall be established to protect all information.

7.3 Security safeguards shall be developed that will not unreasonably impede the collection, use and disclosure of information by authorized persons.

7.4 Persons authorized to access information must be informed of the authority, parameters, purposes and responsibilities of their access, and the consequences of failing to fulfill their responsibilities.

7.5 Access to information shall be limited to only that information which is required for the authorized purpose.

STANDARD 8 – OPENNESS OF POLICIES, PROCEDURES AND PRACTICES

An organization or service provider shall make readily available to individuals specific information about the policies, procedures and practices relating to the management of personal identifiable information. Individuals must be able to clearly understand the extent and circumstances of the collection, use and disclosure of their personal identifiable information.

Guidelines

8.1 An organization or service provider must make information on its policies and practices available. Methods may include, but are not limited to, brochures, mail, electronic and print media, online access or a telephone number. Individuals must, without reasonable effort, be able to acquire information about an organization's or service provider's policies, procedures and practices. This information shall be made available in a format that is generally understandable and shall include:

- the name/title and business address of the person who is accountable for the organization's or service provider's policies and practices;
- the name/title and business address of the person to whom complaints or inquiries can be forwarded;
- the procedure to access personal identifiable information held by the organization or service provider;
- a description of the type of information held by the organization or service provider, including a general account of its use and the circumstances under which it may be collected, used or disclosed without consent;
- what personal identifiable information may be linked to other pieces of information;
- what information is available to third parties;
- information about risks pertaining to the security of personal identifiable information; and
- a copy of brochures or other information that explain the organization's or service provider's policies, standards or codes.

8.2 Individuals shall be able to discuss the organization's or service provider's policies, procedures and practices concerning their personal identifiable information with a knowledgeable person.

STANDARD 9 – INDIVIDUAL ACCESS

Individuals have the right of access to their personal identifiable information. Upon request, an individual shall be informed of the existence, use and disclosure of his or her personal identifiable information and shall be given access to that information. In rare and limited circumstances, withholding personal identifiable information from an individual is permissible if disclosure may have a significant likelihood of substantial adverse effect on the physical, mental or emotional health of the individual or a third party. The onus lies on the service provider to justify to the individual a denial of access. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

Guidelines

9.1 If an individual is denied access, a review process shall exist to address any complaints.

9.2 Individuals must be informed that they have the right to access their personal identifiable information.

9.3 An individual must be told the nature and authorship of the documentation upon accessing his/her personal identifiable information. If the original provider is not available, the institution or service provider shall assist the individual in securing an explanation or interpretation of the information.

9.4 Where an individual believes there is an error or omission in his or her personal record, an amendment may be made. The requested correction shall be made by adding it to the record in such a manner that it will be read with and form part of the record or be adequately cross-referenced.

9.5 When the accuracy of information is in dispute, it shall be clearly marked in the original record.

9.6 Where there is no agreement on amending an error or omission, the individual shall be notified as to the reason, and the individual may add a statement of disagreement to the record.

9.7 Individuals are entitled to know who has accessed their personal identifiable information and for what purposes.

STANDARD 10 – CHALLENGING COMPLIANCE

Individuals must be informed and understand that the organization's or service provider's policies, procedures and practices are open to scrutiny and challenge. An individual shall be able to address a challenge concerning compliance with the above standards to the designated individual or individuals accountable for the organization's or service provider's compliance.

Guidelines

10.1 Avenues must be available for challenging an organization or service provider for noncompliance with the NLCHI Standards. The organization or service provider shall have appropriate procedures to receive complaints.

10.2 The complaint process shall be easily accessible and simple to use.

10.3 Organizations and service providers shall inform individuals who make inquiries or lodge complaints of the existence of relevant complaint procedures.

10.4 An organization or service provider shall respond to all complaints about their compliance with the NLCHI Standards. If a complaint is found to be justified, the organization or service provider shall take appropriate measures, including, if necessary, amending its policies and practices to improve compliance with the NLCHI Standards.

10.5 In those instances where an organization or service provider and an individual are unable to agree on a resolution to a complaint, the matter must be submitted to the review body established by the NLCHI.

STANDARD 11 – OWNERSHIP OF INFORMATION

Individuals are the owners of any and all personal identifiable information pertaining to them regardless of where it is held.

Guidelines

11.1 Individuals own their personal identifiable information; institutions and service providers own the medium upon which it is stored.

11.2 Responsibility for primary maintenance of the record rests with the organization or service provider which recorded the original information.

11.3 If information is transferred to another trustee, responsibility for primary maintenance can be transferred.

11.4 In those situations where information is exchanged, it is the responsibility of the trustee to establish linkages to facilitate corrections, additions and maintenance.

11.5 Conclusions reached by a service provider may constitute intellectual property of the service provider. Where they are recorded, the possibility of shared ownership of the data may exist.

11.6 In those instances where a service provider uses personally identifiable information to publish a professional study or article, all reasonable steps shall be made to make a subject anonymous. Copyright shall rest with the author because the basis of the article is his/her professional interpretation or assessment of a series of personal identifiable information and data of various individuals.

Glossary

Access – The appropriate ability to record, read, edit and/or correct data/information.

Accuracy – The recording of statements of facts, opinions, determinations or assessments that reflect as near as possible what has been provided by the individual, and what the collector has ascertained, hypothesized or determined to be true.

Collection – The gathering, acquiring, or obtaining of data/information from any source.

Confidentiality – The obligation to protect, respect and maintain the privacy of information.

Data – Raw facts, figures, observations, and other forms of measurement.

Data Linkages – The assembling or association of information contained in two or more files or records to relate information for the same individual, family, group, organization, community or population.

Disclosure – Distribution by any means of data/information.

Information – Data that has been processed.

Correcting – Amendments made to an individual's record for the purpose of clarification.

Personal Identifiable – Information about an identifiable individual that is recorded in any form, including information about:

- Service history;
- Provision of services to the individual;
- Payment for service provided to the individual; and
- Any personal identification number or code.

Personal information also includes generic information about individuals who may not be explicitly identified, but whose identity could be implied from the individual or combination of data elements, including:

- Name;
- Identifying numbers assigned to an individual;
- Address;
- Telephone number;
- Birth date;
- Date of intervention, service event or visit; and
- Demographic information or information about the provider of services to the individual if:
  - That information is linked to other information about services provided to an individual; or
  - The information can be associated with other personal information about the individual.

Integrity – The preservation of the information's quality and accuracy of data content throughout storage, use and retrieval so there is confidence the information has not been modified in any way other than as authorized.

Privacy – Protection against inappropriate disclosure of data/information.

Security – The means by which data/information is protected from accidental or malicious disclosure, interruption, modification, removal or destruction.

Service Provider – Any individual or group offering health or social service related treatment, advice or assistance.

Trustee – Any person or group that collects or maintains personal information.

APPENDIX D

DRAFT
Mandate and Implementation of Review Tribunal

Prepared by the
Privacy Sub-Committee
Of the
Newfoundland and Labrador Centre for Health Information
October 4, 2000

For more information contact
Lucy McDonald
Director of Communications
707-777-7530
lucym@nlchi.nf.ca

Introduction

The Privacy, Confidentiality and Access Standards and Guidelines prepared by the Privacy Committee of the NLCHI and adopted by the Board of Management contains a mandate to establish an impartial "review body" to:

1. Consider situations that cannot be resolved by the participants (Sections 1.4 and 10.5 of the Guidelines).

2. Approve record linkage studies for secondary use (5.8, 5.12.3 and 5.12.6).

To develop a conflict resolution model at this time is difficult in light of the absence of comprehensive provincial Privacy and Access-to-Information legislation. As well, the fact that Newfoundland and Labrador does not have an Office of the Privacy Commissioner to act as a final level of appeal compounds this matter. This, therefore, forces us to establish a provisional system pending provincial legislation.

A second constraint is that users of the future Health Information Network range from entities with large numbers of staff such as semi-autonomous Health Boards to small practitioners with one or two staff. Moreover, some users will be in private practice while others will be government departments. In some cases entities will have legislated authority to access information such as MCP and Vital Statistics, while others have a less clear-cut level of access, such as social workers and educators.

To develop comprehensive guidelines, users have been grouped into the following categories based on their ability to meet the following criteria:

1. Respond to requests for information in medical files.

2. Respond to complaints about violations of privacy.

3. Ensure compliance with standards and guidelines.

Categories of Users

1. Groups which can meet all three criteria: Health Boards, large companies, and provincial government departments

2. Groups which can meet only criteria #1 and have an affiliated or contractual arrangement with the groups in category 1

3. Groups which can only meet criteria #1, but have not affiliation with the groups in category 1

Application of Guidelines

1. **Conflict Resolution**: Complaints regarding violations of privacy, incorrect information in personal files and access to information.

   1.1 All service providers and trustees must have a written policy on conflict resolution and the various steps to gain redress.

   1.2 This policy must include the names of the persons authorized to receive the complaint.

   1.3 Since conflict resolution must start at the basic level where conciliation can take place, the **first step** is to be a written request to the primary caregiver responsible, or the person authorized to receive the complaint.

   1.4 The **second step** is to follow the normal internal appeal processes of the organization.

   1.5 The **third step** is to appeal to an independent tribunal, which will be at the NLCHI until the establishment of a Privacy Commissioner. The NLCHI tribunal will be composed of representatives from various service providers, Trustees, Community Groups and the Centre.

   1.6 The **fourth step** is to apply to the courts for redress, as is implied in the present privacy legislation.

Policy on Record Linkages For Secondary Purposes

The Review Body must balance the responsibility to maintain the privacy and confidentiality of individuals while allowing the linking of information for research, resource planning, public health and quality assurance. However, any use of personal health information for a secondary purpose must not cause harm to the individual and shall benefit either the individual or clearly be in the public interest.

Requests for record linkages for secondary purposes must demonstrate that the linkage of personal health information will be limited. Unless clear and compelling reasons exist, all reasonable steps will be taken to make health information anonymous. If it is demonstrated that making health information anonymous would render it inadequate for legitimate uses, the information will be collected and stored in a de-identified re-linkable format.

Types of Record Linkages

1 Linking records from two or more information systems with some or all-identifying information included in the linkage.

2 Linking of records from two or more systems without identifying information but in a form such that the records may be re-identified.

3 Linking of records to create aggregate information that cannot be re-identified.

Reasons for Record Linkages

1 To conduct research subject to the approval by an ethics committee recognized by the Review Body.

2 To link records for the monitoring, management and evaluation of the health care organization or the health care system.

3 To link records to meet national or provincial requirements (e.g., MIS Workload Measurements).

Requests for Record Linkages

The Review Body must approve all record linkages involving the records on information systems that are part of the Health Information Network. Ongoing linkages for resource planning, public health and quality assurance must be reviewed and approved on a regular basis.

All linkages for research conducted by a member of Memorial University must be approved by the Human Investigations Committee before a request for approval is submitted to the Review Body. Research not associated with Memorial University will be submitted directly to the Review Body.

All record linkages involving information systems owned and managed by two or more owners must be co-ordinated, audited, and, if required, performed by NLCHI.

1. Wherever possible the information will be provided in aggregate form.

2. If written consent from the individuals involved has been given, the linkages may contain personal identifiable information.

3. Linkages which may be re-identified must meet the following criteria:
   - 3.1. It has been demonstrated that making health information anonymous would render it inadequate for legitimate uses.
   - 3.2. The purpose cannot reasonably be accomplished unless the personal health information is provided in a form that identifies or may identify individuals.
   - 3.3. Databases must be either destroyed or stripped of any way of identifying the individuals after the data has been used for the approved purpose.
   - 3.4. The linkage is of sufficient importance to outweigh the intrusion into privacy that would result from disclosure of any personal health information.
   - 3.5. It is unreasonable or impractical for the person proposing the research to obtain consent from the individuals the personal health information is about.
   - 3.6. The research project contains:
     - 3.6.1. Reasonable safeguards to protect the confidentiality and security of the personal health information.

3.6.2. Procedures to destroy the information or remove all identifying information at the earliest opportunity consistent with the purpose of the project.
3.6.3. Ensure that the research project complies with the safeguards and procedures described in NLCHI's **Privacy, Confidentiality and Access Guidelines, 1999**.

Data Request Requirements/Policies

1. All requests for person/institution-level and person/institution-identifiable data must be submitted in writing using NLCHI's Data Request Form or must include the following:
    1.1. the party requesting the data
    1.2. the purpose/benefits of the project
    1.3. the level and list of data being requested
    1.4. the analysis to be performed
    1.5. the nature and intent of any data linkages
    1.6. any publications expected to result from data analysis and how they will be distributed
    1.7. the means by which the client will ensure the security of the data
    1.8. a description of how and when data will be disposed or returned
    1.9. the names and titles of all individuals who will have access to the data
    1.10. written consent from the party requesting data to allow the Review Body to obtain further clarification concerning the requested data
    1.11. the results of any ethical committee review of the project and
    1.12. source(s) of funding for the request and proposed analysis

2. Requests are to be accompanied by a signed agreement stating that the client agrees to comply with NLCHI's policies respecting use and disclosure of the data including:
    2.1. to use the data only for the stated purpose
    2.2. that no attempt will be made to link or otherwise identify a data subject other than as divulged
    2.3. to include only aggregate data in publications or reports, in accordance with NLCHI's guidelines for the publication of small cell data
    2.4. to restrict access to the named individuals, maintain the data's electronic and/or physical security, and dispose of the data as specified
    2.5. to not disclose the data to others
    2.6. to provide two advance copies of any publication or report to NLCHI; Note: NLCHI reserves the right to vet any publication or report
    2.7. to provide two copies of any publication or report to NLCHI
    2.8. to acknowledge NLCHI as the data source in any publication or report

3. All requests will be received and reviewed by Product Development who is responsible for the data, in accordance with the NLCHI principles, policies and procedures for data disclosure.

4. Person and institution-level data files are normally provided for a period of one year, following which the original data set and any copies thereof must be returned to

NLCHI or destroyed. Any extension to this period must be approved by NLCHI in writing.

5. Unless otherwise specified in a written agreement, data are provided for a specific use, and for each new use a separate application must be submitted.

6. Clients who violate conditions for disclosure or who misrepresent the nature of the data supplied to them, will be subject to sanctions, which may include:

   6.1. a written complaint to the sponsoring organization
   6.2. refusal of future access to data by the individual(s) and/or organization(s)
   6.3. seizure of any data released by NLCHI
   6.4. legal action.

3. Newfoundland and Labrador Health Boards Association

NEWFOUNDLAND
AND LABRADOR
HEALTH
BOARDS
ASSOCIATION

FREEDOM OF INFORMATION AND PRIVACY IN THE HEALTH SYSTEM

NLHBA Mailing Address
P.O. Box 8234
St. John's, NF
A1B 3N4

NLHBA Delivery Address
Beclin Building
1118 Topsail Road
Mount Pearl, NF
A1N 2M3

Telephone (709)364-7701
Facsimile (709)364-6460
Email nlhba@nlhba.nf.ca
Web Site www.nlhba.nf.ca

**A Presentation to the
Freedom of Information Review Committee**

March 22, 2001

MISSION

As a federation of health boards, the NLHBA is dedicated to working collaboratively with the province's publicly-funded health system through dynamic leadership in advocacy, the creation and exchange of ideas, and development of consistent policies, standards, and guidelines.

DEFINITION OF "HEALTH"

Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.

World Health Organization

1 Introduction

The Newfoundland and Labrador Health Boards Association (NLHBA) is glad to have the opportunity to make a brief presentation to the Freedom of Information Review Committee ("the Committee") on principles for protection of personal health information for consideration in its recommendations to Government on Freedom of Information legislation. We welcome the opportunity to take part in this debate, and hope that it will result in a legislative and regulatory framework that will facilitate the accountability of Government to its citizens, protect the privacy of individuals and the confidentiality of their personal information and facilitate the improvement and development of the health system in the province.

From the perspective of the health system, the mandate of the Committee is unfortunately too narrow to allow a full examination of this important issue. Without a consideration of the implications of a reasonable expectation of privacy as one of the core values of Canadian society, discussion of the public's right to access to, and amendment of, information collected and held by Government will be necessarily restricted. This presentation will therefore consider, in the health context, both an individual's legitimate need for protection of personal privacy and confidentiality of personal health information and the collective need and requirements of society for limited disclosure of personal health information.

2 What is Health Information and Where is it?

Collection, use and disclosure of health information is governed by a mixture of separate pieces of legislation, the *Freedom of Information Act,* the *Hospitals Act* and other legislation such as the *Child, Youth and Family Services Act* and the *Adoption Act*. In this province, the *Freedom of Information Act* provides the dual function of a right of access by the public to information in records of departments and restrictions to that right for reasons of department operations and protection of personal privacy. The provisions in the *Hospitals Act* regulate the access, use and disclosure of hospital records held by

Institutional and Integrated Health Boards in the province. Access to personal information held by the Integrated and Health and Community Services Boards is regulated by the *Freedom of Information Act*. The *Adoption Act* and Part VIII of the *Child, Youth and Family Services Act* will also address access and disclosure issues but are not yet proclaimed. Some personal records dating back to before the integration of the community services with the health services are still held by the Department of Health and Community Services with access requests governed by the *Freedom of Information Act*. The *Privacy Act* is a narrowly focused piece of legislation establishing a statutory tort (civil liability) for the violation of privacy due to auditory or visual surveillance, listening to or recording personal conversation, using an individual's name, likeness or voice for advertisement or promotion, or use of personal letters or other documents. Consideration of freedom of access and individual health information would therefore not involve the *Privacy Act* in its current form.

However, in today's health system individual health information is held not only by Government and its agencies, including Memorial University, but also by various private bodies, such as physicians' offices and private clinics, private research companies and other private health organizations, both large and small. Health services are delivered in a number of different types of locations, such as institutions, clinics, communities and private residences. The integration of community services into the health system has broadened the definition of health and the services that can be included as health services. Some health services are delivered privately, such as physiotherapy or optometry, and a number of alternative health disciplines are increasingly often linked to the health system, such as chiropractic, massage therapy or acupuncture. We know little about the level of security for individuals' health information held outside the public system, and security for health information held within the public system is strained by the pace of change and economic constraints.

Continuing technological advances allow health information to be collected and held in a number of different ways, offering both enhanced security and new risks of unauthorized access and use that were not envisaged by current legislation. On the one hand, the newly paperless Saint-Eustache Hospital north of Montreal was judged by the Quebec privacy commission to be more secure than a similar institution with paper records. On the other hand, the linkage of information from, for example, private insurance companies with employee records and linkage of employment insurance records with customs records has caused serious privacy concerns that will need to be addressed in the health context.

At the same time, the huge numbers of existing conventional paper and film records in health and community services in both public and private locations are the focus of access requests for reasons secondary to the original purpose for collection. Storage is becoming a problem and there are no province-wide policies to regulate the preservation, security and/or destruction of health records. Collections of human tissue that offer new sources of personal health data offer a new area of health information that will need to be addressed. A patchwork of policies and legislation is attempting to address privacy and access implications in a number of different health contexts. The pace of change in this area and the inability of the current legislative and regulatory framework to offer adequate consistent guidelines means that the time is ripe for a comprehensive review and renewal.

Government should undertake lengthy public consultations with the health community in order to develop a separate piece of legislation governing health information. A key factor in the proposed health information legislation will be the development of a clear definition of health information, which is broad enough to incorporate health information collected in all types of public and private organizations and which sets out equal obligations and penalties for public and private individuals and organizations.

3 Who should have Access and under What Conditions?

It has been clearly established in the *Hospitals Act* that the record compiled in a hospital on an individual is the property of that hospital authority. However the individuals in question have the right to expect protection of their personal privacy and confidentiality of their information, with certain clearly-defined exceptions, statutory and otherwise. A defining characteristic of the health system is the physician/patient expectation of confidentiality over the extremely sensitive personal information that is contained in patient files. Individuals have the right to full access to their own health records, to challenge accuracy and completeness of the information, and to have it amended where appropriate. As far as access by individuals is concerned, however, most people do not know how to seek access to their health records and would find it difficult to identify where those records might be located. Access privileges for others must be strictly regulated on a "need to know" basis according to the health professional's requirements for the individual's care.

On the other hand, there are clear benefits to society from limited disclosure for secondary use of personal health information for public health purposes, health research studies, quality assurance, program planning and so on. The challenge lies in securing the management, integration and evolution of the health system, while respecting the legitimate demands of individuals for the protection of their personal health information. Care will be needed in order to avoid either an overly-restrictive regime that may significantly impede valuable health research and improvements to the health system, or inappropriately free access by third parties to sensitive personal health information. How can appropriate circumstances be determined for loss of individual control over access and use of personal health information?

This question can be addressed by defining secondary access from the outset as an infringement on privacy, as exceptions to be authorized on a strictly limited basis using open and agreed-upon standards to determine whether the infringement can be justified and regulate the proposed activity. Health information is initially collected in the course of the diagnosis, management and treatment of the individual. Any secondary use of the data needs clear disclosure rules and limits to access, in which the applicant would be required to identify:

- the purpose for use of the data
- proposed safeguards against unauthorized access, security, integrity and confidentiality of the health information in question

- proposed methods of protecting individual privacy.

Legislation regulating health information should also offer a clear regime regarding consent which is appropriate to the health sector, recognizes the complexities of consent in the health field and deploys the full scope of means for protecting privacy (encoding, stripping or encrypting of data, confidentiality agreements, review and oversight by independent body, etc.). For accountability purposes, legislation should also require an electronic access tracking system to keep track of access to records and reasons for access requests, and set out a regime for the validation and conversion of health records to electronic formats.

The standards developed by the Newfoundland and Labrador Centre for Health Information and the Canadian Centre for Health Information, based on the Canadian Standards Association CSA Standards, provide an excellent starting point for discussions on overall policy for health information legislation governing privacy and access to health information in our province.

4 Who should Review the Process?

Newfoundland and Labrador needs an Information or Privacy Commissioner or Commission Office with the responsibility of:

- overseeing and monitoring the consistent province-wide application of privacy and freedom of access legislation,
- ensuring compliance both by Government and the private sector,
- participating on the provincial research ethics board, which reviews health research with human participants in the province,
- and investigating complaints.

It is possible that this role may be given to the newly-established Ombudsman office, although the complexity and breadth of the issues involved may require a separate organization dedicated to information and privacy issues.

5 Conclusion

The health system in Newfoundland and Labrador has changed significantly over the past few decades. It was clearly envisaged at the time of developing the *Hospitals Act* that the health system would require special attention with regard to privacy and access to the particularly sensitive personal health information in hospital health records. This legislative decision, which dealt with the health system as it then was, now needs to be revisited in the context of today's health system. Legislation for health information needs to meet the challenges of the expanded mandate of the health system with its existing records in many locations and of the rapidly-evolving technological potential for collecting and storing health information. This merits a separate comprehensive piece of health information legislation, developed through broad consultation with all stakeholders in the health system, to address the complex issues in the most effective manner.

4. Newfoundland - Labrador Human Rights Association

NEWFOUNDLAND-LABRADOR HUMAN RIGHTS ASSOCIATION
P.O. BOX 6203, St. John's, NF A1C 6J9
Telephone: 709-754-0690 **Fax:** 709-754-0690
nlhra@nf.sympatico.ca http://www.stemnet.nf.ca/nlhra
International Decade for a Culture of Peace and
Non-Violence for the Children of the World

Submission to the Freedom of Information Review Committee
Regarding the
Freedom of Information Act and Regulations

Prepared by: **the Newfoundland-Labrador Human Rights Association**
Approved: **March 20, 2001**
Presented: **March 22, 2001, 2:00 p.m.**
Presenters: **Bruce Gilbert, President, Board of Directors**
Jerry Vink, Volunteer Executive Director

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Foreword:

The Newfoundland-Labrador Human Rights Association was founded in 1968 and has been active in the field of human rights promotion, education and advocacy. A Board of Directors drawn from the business, educational and professional sectors, directs its activities. The Association is a registered charity with Revenue Canada and is incorporated under the *Newfoundland Corporations Act*.

The Newfoundland-Labrador Human Rights Association's commitment to promoting human rights is reflected in its constitution, which contains the following objectives:

1. To promote respect for and to defend human rights in Newfoundland and Labrador.
2. To promote respect for human rights as proclaimed in the *Universal Declaration of Human Rights*, the *Canadian Charter of Rights and Freedoms*, the *Newfoundland Human Rights Code* and all other national and provincial legislation designed to enhance these rights.
3. To advocate for the implementation of international instruments such as the conventions on the *Rights of the Child* and on the *Elimination of all Forms of Racial Discrimination*, as well as the covenants on *Civil and Political Rights* and *Economic, Social and Cultural Rights*.

In the discussion on the need to improve the Freedom of Information legislation, it is fundamental to note that Canadians enjoy a number of basic freedoms defined in the *Charter of Rights and Freedoms*. One of these important freedoms is that of Free Speech.

Freedom of speech is more than just the expression of ideas. It implies the right to access information so that the exchange of ideas can be both informed and relevant. It also means that citizens must have the ability to influence society and its government. If the opportunity to bring about change is not possible, then the exchange of ideas will be sterile and irrelevant rather than vital to the development of a dynamic community.

The Association's presentation to the Freedom of Information Review Committee is based on our commitment to free speech, a basic human right.

We feel strongly that for human rights to prosper and grow, there must be access to information held by government and its public, semi-private and private agents and contractors. At the same time, we recognize, as stated in the *Canadian Charter of Rights and Freedoms*, that this right can be subject only *to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*.

The Board of Directors,
Newfoundland-Labrador Human Rights Association,
March 20, 2001.

Introduction

The Newfoundland-Labrador Human Rights Association supports the review the *Freedom of Information Act*.

Although we are in favour of the review and agree that modernizing the Act is necessary, we believe that these actions are only part of the solution. A review and the implementation of possible remedies might lead to greater ease in obtaining information on public policy, however, **we are not convinced that the present mandate of the Review Committee will go far enough to address our concerns about the need to enact comprehensive privacy protection.**

The present legislation in Newfoundland and Labrador governing access to information is entitled *An Act Respecting Freedom of Information*, which was enacted in 1981. At the time of its introduction, it was accompanied by an act regulating privacy entitled *An Act Respecting the Protection of Personal Privacy*.

Both pieces of legislation have remained essentially unchanged and are still in force at this time.

During the past thirty years there have been enormous changes in technology; in perceptions of the role of government; in the sophistication of the public's abilities to evaluate governmental actions; and in the role of quasi-governmental and private entities in the delivery of services. These changes have led to a situation where the Freedom of Information, as well as the Protection of Privacy legislation needs to be reviewed and rewritten to meet the challenges of modern society.

The Minister of Justice, the Honourable Kelvin Parsons, in his statement in the House of Assembly, also expressed this sentiment. On December 12th, 2000, in reference to the *Freedom of Information Act*, he indicated that the legislation must be improved to reflect the major changes in the way we manage information and to meet the requirements of the new forms of communications such as e-mail and voice mail.

Government has assembled a committee to review the *Freedom of Information Act*. The impetus for this decision is clear from the Minister's statements and was further emphasized by the Minister of Justice's reference to the Premier's comments of December 4th, that government is committed to:

> *An open, transparent process in the development and implementation of public policy, and . . . to ensure that our legislation remains clear and relevant in this new age of information.*

1. Freedom of Information and the Need for Privacy Legislation

The mandate of the committee is limited to the *Freedom of Information Act*. Although this legislation needs to be improved, the Association is concerned that the scope of the review is too restrictive.

There have been past instances of government addressing issues in their narrowest sense. The result has often been counter-productive. More so since it has been our experience that once legislation has been amended, or introduced, there is a tendency not to go back and make appropriate changes when flaws are discovered.

The Association is concerned that the problems with the *Freedom of Information Act* cannot be addressed unless the various issues related to privacy legislation are also addressed. Just as the initial legislation on access to information was introduced in tandem with the *Privacy Act*, so must the present review be coordinated with the requirements to protect privacy.

This concern is a theme that runs throughout this document and one that should become clear to the committee as it tries to fulfill its mandate. There has to be a balance between freedom of information and privacy. This equilibrium was relatively easy to achieve in the past when paper files were the norm. However, the new technology and the increasing intrusion of electronic means of data collection present a number of unique and interesting challenges.

For instance, consider the following examples that illustrate potential problems:

- How will the legislation relate to *privacy legislation*? How will it relate to privacy if we follow other jurisdictions and introduce two sets of privacy legislation - one dealing with medical information and one with the other types of personal information?
- How will the legislation relate to the new *electronic system of health information*? Obviously, freedom of information does not allow access to individual health records. However through institutional and aggregate data, information can be collected which can target relatively small groups of individuals. This can lead to such situations as the identification of the predominance of HIV infections or genetically carried disabilities in given locales.
- How will the legislation relate to *privacy concerns of caregivers*, whose personal details will be maintained in the electronic Health Information Network?

Recommendation 1.

The development and enactment of the Freedom of Information legislation must be coordinated with the introduction of full and comprehensive privacy legislation.

2. Application to Private and Semi-Private Entities

When the initial two pieces of legislation governing freedom of information and privacy were first enacted, the main depository of information largely involved government institutions. Since that time, there has been an increasingly greater involvement of private and semi-private entities in the delivery of services as well as in the collection of personal information.

The range of such organizations is quite broad. They include such entities as private nursing homes and home care businesses. This phenomenon is not limited to the health field but also involves such activities as data collection, counselling and other contracted services. Indications are that this public, private partnership sector will increase in importance.

Another related sector, which is still new and untested, involves research in such areas as genetics. In fact the whole area of government partnerships in research is quite problematic for the protection of privacy because it involves extensive intrusion into the background of individuals, as well as their extended families. Unless there is adequate legislation involving freedom of information, it will be difficult to monitor the activities of these private and semi-private entities in the public domain.

Moreover, since a great deal of personal information is held by non or semi-governmental institutions, how will the right to access information be balanced with the need to protect privacy? This balance is crucial, especially since the involvement of private and semi-private entities often relates directly to the collection of personal information.

The Association therefore urges the Review Committee to ensure that its recommendations include amendments that will guarantee that this private and semi-private sector be included in the legislation. The application of freedom of information must not be solely at the discretion of government. Equally, it should not be covered by such vague language as presently exists in the legislation when it allows a head of a department to refuse information because it *would affect the competitive position* of a public, semi- private or private entity. If a company receives public funds, then their affairs should be open to the taxpayers of this province.

This challenge must be addressed at this time, if we are to have adequate freedom of information legislation. However, the Association maintains that this matter cannot be reviewed or resolved in isolation. Without comprehensive privacy legislation, which also reflects the public/private partnerships in the delivery of services and in the collection of information, it seems unrealistic to expect that appropriate freedom of information legislation can be developed.

Recommendation 2.

Freedom of Information legislation must incorporate access to information obtained and retained by private and semi-private entities that deliver services on behalf of government. This obviously must also be governed by comprehensive privacy legislation.

3. Co-ordination With Other Quasi-Government Entities

At present there are a number of entities, which were established to deal with issues related to the protection of the public. Two of these, which are often in the public spotlight, are the Public Complaints Commission and the Human Rights Commission.

In addition, government has indicated that it will be re-establishing the Office of the Ombudsperson as well as setting up a new office, the Children's Advocate. Moreover, in the near future, government will have to establish a Privacy Commission, if Newfoundland and Labrador is to keep abreast of developments in other provinces and at the federal and international level, as well as to meet the challenges of the new information technology.

The Association fully supports the establishment of these offices.

However, the Association is also convinced that these commissions must be established as separate entities since their mandates are complex and demanding.

Although these quasi-governmental commissions have the common goal of protecting the public or certain vulnerable groups, their mandates will also be quite distinct. Also, their individual responsibilities will be quite broad and at times they will probably be in competition.

For example, a Privacy Commission concerned with protecting personal information will have to use a different approach than a Freedom of Information Commission. Equally, the Public Complaints Commission focuses on the Police, while the Ombudsperson will deal with those departments that are not governed by the police legislation. In the same vein, a Children's Advocate who will deal with children as a vulnerable group has a smaller constituency than the Human Rights Commission whose mandate encompasses the whole population.

It is important to remember that these different approaches, mandates and constituencies are indications of a healthy situation. In a vibrant society, competition between mandates promotes public participation and interest.

This range of protective services is a new model for the province. At the federal and some provincial levels, these autonomous organizations have existed for a number of years. They have, and in many instances, are developing creative and important means of protecting the interests of people against increasingly intrusive governmental and private sector activities.

To ensure full freedom of information we therefore need to establish an office of the Freedom of Information Commissioner, one that is designed to deal on an equal footing with the other quasi-governmental agencies.

The Association supports this ideal, but since we also support a similar structure for the Ombudsperson, the Children's Advocate, and the Privacy Commission, the guidelines for their interaction must be defined. This might seem straightforward but there are a number of obstacles:

- How do we deal with the concept of a primacy clause, as exists in the legislation governing the Human Rights Commission?
- Is it appropriate to have any of those bodies exempted through an order-in-council or similar mechanism?
- How do we ensure coordination between these commissions so they will be able to function effectively?

Recommendation 3.

To ensure full access of information and to ensure co-ordination with present and future quasi-governmental agencies responsible for the protection of the public, there must be an office of the Freedom of Information Commissioner. This position cannot be merged with such positions or agencies as those responsible for privacy or the ombudsperson, since there could be [illegible] inherent competition of interest in the various mandates as well as in the need for distinct and unique approaches to the resolution of complaints.

4. Independence of the Freedom of Information Commissioner

Related to the issue of having a new level of quasi-judicial commissions designed to protect the public from unwarranted intrusions or actions on the part of government or governmental agencies is the matter of independence of action. The Freedom of Information Commissioner must be independent of the government. This can best be accomplished by having that individual report to the House of Assembly (or the Speaker) rather than an individual Minister.

Independence of commissions was first proposed by the Association in 1992 with respect to the Human Rights Commission. It was repeated in our presentation entitled *The Newfoundland Human Rights Code, Recommendations for Amendment: 1996.* In it, we indicated that

> *Independence is not to be viewed only in an objective manner. It must also be recognized that for a Commission to function properly, it must be perceived by the public as being independent. The perception of independence is hindered because of the appearance of dependence, as the Commission is accountable to an individual minister.*

The *Select Committee on Children's Interest* in June 1996 echoed the above recommendation. It suggested that the proposed Children's Advocate have a similar form of independence by being responsible directly to the House of Assembly rather than an individual ministry.

To promote continuity, the Commissioner should be appointed for five years. To further enhance the independence of the Freedom of information Commission, federal or provincial politicians should be disqualified from appointment for at least five years after leaving political office. The same prohibition should apply to federal and provincial civil servants from the middle and upper levels of government. (Regional Manager to Deputy Minister)

The Association would like to further suggest that community participation should be encouraged through the following means:

- The Freedom of Information Commissioner should be selected from a list of candidates solicited from community and professional organizations.
- Community and professional groups should be invited to sit on a management committee to help direct the Commissioner in carrying out his or her duties. This should include an annual evaluation of the quality of implementation of the Commission's mandate.

Recommendation 4.

1. ***The Freedom of Information Commissioner must be independent of government and responsible to the House of Assembly.***
2. ***There should be a prohibition on the appointment of candidates who held elected or civil service positions in the previous five years.***
3. ***Candidates should be selected from a list of names proposed by community and professional groups.***
4. ***There should be a management committee composed of representatives from community and professional groups to supervise the work of the Freedom of Information Commissioner.***

5. Municipalities and School Boards

Since the introduction of the initial legislation governing freedom of information, there have been a number of developments in municipal and educational services which have a great impact on the whole concept of freedom of information.

Traditionally, municipal services were limited and their mandates and responsibilities were fairly clear. The same applied to the role of the provincial government. However, during the past decade there has been continued downloading of services to the municipalities. Subsequently, due to a lack of resources, conflicts at the municipal level have become heated and bitter.

A similar development has occurred at the school board level. When the denominational authorities ran the educational establishment, there existed a certain cohesion of opinions. This was re-enforced by the need to present a unified front in negotiations for allocation of resources *viz a viz* other denominational boards and *viz a viz* the government. However, with the reform of the educational system and the limited resources available to the newly re-constituted Boards, conflicts are more open and debates are more rigorous and public.

Moreover, in both cases, the rigorous debates and the reduced resources have had at least one unfortunate consequence, which has had a direct bearing on freedom of information. Since municipalities and school boards are not specifically listed in the schedule published as per Article 5 of the Act, and since they are not considered a department of the government of the province, they have developed a culture of secrecy.

This runs counter to the basic tenets of democracy and open public policy, which according to the Premier's comments of December 4th, 2000 is a goal of the present government.

This tendency to withhold information on the part of municipalities and school boards is fairly widespread. For the purpose of this presentation it is sufficient to mention two examples:

- Since municipal councils are not included in the *Freedom of Information Act*, they have great leeway in which type of information they will release to the public. Correspondence on such matters as Town Plan Reviews is kept confidential unless it is tabled at a public meeting. Thus there is a tendency for councils only to publish items that are to their liking while critical items are kept behind and therefore not accessible to the media and public-at-large.
- A great concern of all parents is the health of their children. They worry about the air quality in their children's schools. Considering the age of many educational structures and our increasing awareness of the dangers of certain construction materials, this concern has a legitimate basis. At the insistence of school councils, air quality studies have been conducted. Often however, school boards refuse to release the full study for perusal by the parents.

Recommendation 5.

Municipalities and School Boards must be included in the Freedom of Information legislation. Since they provide front line services to all citizens and since they are elected positions, their inclusion must not be at the discretion of the Lieutenant Governor in Council, but rather enacted, as are all other government departments.

6. Data Sharing

At the time that the original legislation was first introduced, information was primarily contained in paper files. It was cumbersome and often not feasible for government departments to share information.

The development of electronic information systems means that the sharing of data is relatively easy. Moreover, the increasing involvement of other provincial and federal governments as well as private entities in the collection and exchange of data is problematic and needs to be governed by appropriate privacy legislation. Unfortunately, we do not have this protection available to us in this province.

There are many examples of data sharing and the problems that this may cause.

The Insurance industry provides information of financial settlements to the provincial social services agencies, probably using the SIN numbers as identifiers. This form of data exchange needs to be regulated to ensure privacy protection and to prevent discrimination based on source of income. Aside from the issue of right and wrong, the public should be able to know exactly which department of government, which private entity and which public/private partnership accesses each other's information. This is a prerequisite of a democratic and open society.

However, regardless of the type of privacy legislation to be introduced and the possible regulation on data sharing, the Freedom of Information Act must include a section dealing with this type of information exchange.

The role for the Freedom of Information Commissioner contemplated in this presentation is one of responding to complaints as well as one of active monitoring. Moreover, the legislation must include an obligation on the part of government departments and public, semi-private, and private entities that act as agents of government, to provide the Commission with clear and precise listings of entities with whom they exchange information. This list must be in a standard format for ease of examination and comparison.

Since this list will not include personal information, which might be covered by privacy legislation, it should be made public automatically through the office of the Freedom of Information Commissioner.

The Association realizes that this part of the mandate is a new one. It also means that many technical and legal issues need to be examined and resolved. However, the reality of modern technology and society is that data sharing is an important fact of life and one that will grow with time.

Recommendation 6.

The legislation must include the obligation of all government/semi-government/public/ private entities to provide a list of entities with whom they share information.

Recommendations

1. The development and enactment of new Freedom of Information legislation must be coordinated with the introduction of full and comprehensive privacy legislation.

2. Freedom of Information legislation must incorporate access to information obtained and retained by private and semi-private entities that deliver services on behalf of government. This obviously must also be governed by comprehensive privacy legislation.

3. To ensure full access of information and to ensure co-ordination with present and future quasi-governmental agencies responsible for the protection of the public, there must be an office of the Freedom of Information Commissioner. This position cannot be merged with such positions or agencies as those responsible for privacy or the ombudsperson, since there could be an inherent competition of interest in the various mandates as well as in the need for distinct and unique approaches to the resolution of complaints.

4. i. The Freedom of Information Commissioner must be independent of government and responsible to the House of Assembly.
   ii. There should be a prohibition on the appointment of candidates who held elected or civil service positions in the previous five years.
   iii. Candidates should be selected from a list of names proposed by community and professional groups.
   iv. There should be a management committee composed of representatives from community and professional groups.

5. Municipalities and School Boards must be included in the Freedom of Information legislation. Since they provide front line services to all citizens and since they are elected positions, their inclusion must not be at the discretion of the Lieutenant Governor in Council, but rather enacted, as are all other government departments.

6. The legislation must include the obligation of all government/semi-government/public/ private entities to provide a list of entities with whom they share information.

5. Newfoundland and Labrador Federation of Municipalities

NLFM
50 Years

Newfoundland and Labrador
Federation of Municipalities

March 27, 2001

Ms. Joan Dawe
Chairperson
Freedom of Information Review Committee
2nd Floor, Beothuck Building
20 Crosbie Place
St. John's, NF A1B 3V8

Dear Ms. Dawe,

Enclosed please find a submission to your Review Committee respecting the Newfoundland and Labrador Federation of Municipalities' position on the Freedom of Information legislation and regulations.

For logistical reasons we were unable to be present at the hearings which took place on Thursday, 22 March 2001 in St. John's and take this alternate route to ensure that the collective voice of municipal government is clearly heard. As you will note from the enclosed submission, the NLFM would have serious concerns, on behalf of the municipal governments of our province, should they not be exempted from this legislation.

Should you require additional information or more details regarding our position please feel free to contact the NLFM office or me directly through my home number (679-2232).

We thank you in advance for your serious consideration of our position.

Sincerely yours,

Newfoundland and Labrador Federation of Municipalities

Derm Flynn (Mayor)
President

Enclosure

P.O. Box 5756 • St. John's, NF • A1C 5X3 • Tel: (709) 753-6820 • Toll Free: 1-800-440-NLFM • Fax: (709) 738-0071
E-Mail: nlfm@nlfm.nf.ca Website: www.nlfm.nf.ca

Newfoundland and Labrador
Federation of Municipalities

NLFM Submission to Freedom of Information Review Committee

March, 2001

The Newfoundland and Labrador Federation of Municipalities (NLFM) is pleased to have this opportunity to present its views with regard to freedom of information legislation for the Province. Formed in 1951, the NLFM is the official spokesperson for municipal government in the province, currently counting 276 of the 291 incorporated municipalities among its active membership. To put this into perspective, our membership encompasses 99.4% of citizens residing in incorporated municipalities and 88% of the total population of the province. A brief profile of the Federation is appended (Appendix A).

The NLFM supports the concept of clear and meaningful legislation that adequately protects the right of the public to information. However, our position, on behalf of municipal governments, is that municipalities should be exempt from this legislation.

The main reasons for proposing exemption for municipalities are that (a) public access to municipal information is already well-protected through the very specific provisions of the *Municipalities Act, 1999*; and (b) as with any other level of government, municipalities must be given leeway to conduct certain business of a confidential nature without risk of compromising the integrity of sensitive negotiations, whether internal or external. These issues are further addressed below.

Role of municipal legislation.

The *Municipalities Act, 1999* came into effect in January 2001. In it, there are clear provisions for public access to information. Section 215 of this Act specifies quite precisely the documents that must be made available by council for public inspection. Section 216 further provides authority in relation to actions commenced in a court or the Trial Division for the Municipal Clerk to make available copies of documents, for a reasonable fee, when so ordered or satisfied that such documents are required in evidence. Copies of these Sections are appended (Appendix B).

The NLFM believes that the public's right to information is well protected through this legislation while the necessity to preserve confidentiality is adequately protected without the onerous burden of identifying in another Act which items of information should be specifically exempt from public access.

In addition, the *Municipalities Act, 1999* requires that all decisions of council be made in the regular, public meeting, providing a further level of public access to information.

Protection of the municipal right to confidential negotiations.

Municipal governments are frequently involved in confidential negotiations. These can include matters dealing with staffing, with individual taxpayers, and with existing or new businesses that might be considering locating, expanding or other changes which could be jeopardized through premature public disclosure. Clearly there is a need to balance the public's right to access to information with adequate protection of the privacy of individual taxpayers and businesses within the municipality.

The NLFM submits that the current structure as prescribed within the *Municipalities Act, 1999* provides the appropriate balance between these two competing requirements.

Effect of not exempting municipalities.

Should municipal governments not be exempted, they could potentially incur considerable expense in addressing requests for information. For example, each request would require analysis as to whether it falls within the legislative requirement. Also, each request that is found to be legitimate within the requirements of the legislation would require staff time to address and fulfill the request.

In smaller municipalities, which is by far the majority, these two situations alone could constitute a considerable financial burden. Most municipal offices are staffed on a part-time basis by clerks with little or no legal training. Thus, individual requests would require the hiring of a lawyer or other legal expert. In addition, the actual information retrieval and provision of the information in response to the request would be an additional burden on staff already overburdened with their normal municipal workload.

Based on anecdotal information provided by the NLFM staff, it must be concluded that a considerable burden of frivolous and inappropriate requests for information are likely to be forthcoming in the event that municipal governments are not exempted.

We submit that dealing with this burden, when appropriate access to information provisions already exist within the governing legislation for municipalities, would not be a wise use of scarce taxpayer dollars.

In conclusion, we thank the Review Committee for accepting our submission and trust that our views on the highly significant negative implications of not exempting municipalities from Freedom of Information legislation will be taken into very serious consideration.

APPENDIX A

NLFM
50 Years

Newfoundland and Labrador Federation of Municipalities

Organizational Profile

The Newfoundland and Labrador Federation of Municipalities is the acknowledged **spokesperson of the municipal sector**. Formed in 1951, we represent the interests of all municipal governments, counting 275 of the 291 incorporated municipal governments in Newfoundland and Labrador among our active membership. Altogether, this encompasses over 99% of citizens residing in incorporated municipalities, and 88% of the total population of the Province.

A registered charity, we are governed by an eleven-member, elected Board of Directors with pan-provincial table officers, seven regional directors, and directors representing small town and large urban caucuses. Our headquarters are located in St. John's where we own a small building. We employ a full-time staff of six.

Our annual operating budget is approximately $750,000. Major revenue sources include membership fees, corporate sponsorships, administrative fees associated with membership services, and external grants for specific projects. Charitable receipts are not issued.

We believe in strong communication with our members to whom we issue regular fax-based **Info***NOTE* communications. Members access the **Info***NOTE* service to send requests for information or to advertise the availability of surplus equipment for sale. The *Municipal News* magazine, published three times per year, is sent free to all elected officials and administrative staff in our member municipalities. Other reports and documents are forwarded regularly as appropriate.

Our annual general meeting, held in November and rotating between the Cities of St. John's and Corner Brook and the Town of Gander, is the largest, regularly-held convention in the province. Attendance ranges between 750 and 1000 delegates, partners and guests. The associated Trade Display attracts in excess of 60 booths each year.

A variety of services are available to all member municipalities, including free telephone legal advice or human resources advice, municipal long-distance savings plan, municipal general and liability insurance program, financial collection service, grant and proposal writing service, parliamentary procedures advice, and employee benefit plans. These services enable our members to save more each year than the cost of membership, and contribute directly to increased efficiency of local service delivery thus sparing taxpayer dollars.

For individual councillors and staff we offer group home and automobile insurance, a residential long-distance savings plan, and post-secondary scholarships for dependents as well as a Price Club membership available to be used by members visiting the City.

We have a strong program of Corporate Sponsorships and Supporting Memberships which allow the business community to improve relations with the municipal market it serves while assisting the Federation in its efforts to maintain a strong municipal sector.

Major corporate sponsors include Atlantic Canada Opportunities Agency (ACOA), NewTel Communications, Baine Johnston Insurance, Inc., Newfoundland Power, Credit Recovery Limited, Certified General Accountants Association of Newfoundland, Municipal Assessment Agency, Fisher Associates, Canadian Petroleum Producers Institute, VOCM, Flotech Enterprises Ltd, Regional Cable Systems Ltd, and the provincial Departments of Municipal and Provincial Affairs, Environment and Labour, and Development and Rural Renewal.

Noteworthy Initiatives

Recent highlights include:

- **Regional Workshops in Community Economic Development** being held around the province in cooperation with ACOA. Located in regional centres and in areas where problems of unemployment are greatest, the purpose is to educate municipal councils about the ways of economic development. This initiative is currently in Year 3 of a multi-year process.

- **NLFM 2001 Community Fishery Strategy** *"Catch a-hold this One: The Future of the Fishery in Fishing Communities"*, held 01 - 03 March 2001 in Gander.

- **Municipal Training and Development Partnership** involving the NLFM, the provincial Department of Municipal and Provincial Affairs, Newfoundland and Labrador Association of Municipal Administrators, and Combined Councils of Labrador for the development and delivery of training to municipal elected officials and administrative and non-administrative municipal staff in the province.

- **New Membership Services** under development include access for municipal governments to acceptance of tax revenues by credit card or direct debit at reduced rates through the NLFM's on-line service.

- **Annual Municipal Leadership Forum** for policy development, formerly the "Mayors' Forum", held each June.

- **Annual Strategic Plan** review and revision.

- **NLFM's Towns in Partnership ("TIPs") Program** being introduced in cooperation with the Newfoundland and Labrador Association of Municipal Administrators where larger towns partner with smaller towns to provide mutual advice and assistance.

- **Annual Joint Meetings of Municipal Interest Groups** with the NLFM Board of Directors and the boards of the Newfoundland and Labrador Associations representing Parks/Recreation, Municipal Police and Enforcement Officers, Canadian Public Works, Fire Chiefs and Firefighters; and Municipal Administrators.

Lobbying Interests

Recent lobbying efforts have focussed on a number of issues:

- Review and major overhaul and simplification of the various sources of provincial financial support for municipal governments

- A new *Municipal Elections Act* to revise and replace the elections provisions of the *Municipalities Act, 1999,* two cities Acts, and the St. John's Election Act.

- Equalization of treatment of incorporated and unincorporated areas within the province including development of a mechanism to draw all of the province's residents into the benefits of municipal government.

- Retention of new and existing fisheries quotas within the province as per the Law of the Sea Adjacency Principle and our historic fishing dependance.

- Recognition of Gulf Ferry Service as integral part of Trans-Canada Highway and designation as "essential service".

- Recognition of the importance of the CBC, particularly the rural services which have recently been drastically cut, as an essential unifying voice for rural regions within Newfoundland and Labrador and for all rural regions across Canada.

- Maximization of the economic benefits of natural resource development to the province and its residents.

- Recognition of municipal government as a legitimate order of government by the province and, through Constitutional amendment, the government of Canada.

Structure of the NLFM

The NLFM Board of Directors numbers eleven from all across the Province:

Name and Title	Board Position	Home Community
Mayor Derm Flynn	President	Town of Appleton
Councillor Carl Tessier	Vice-president	Town of Gander
Councillor Cynthia Downey	Southwest Director	Town of Stephenville Crossing
Deputy Mayor Priscilla Boutcher	Northwest Director	City of Corner Brook
Councillor Graham Letto	Northern Director	Town of Labrador City
Mayor Walwin Blackmore	Central Director	Town of Grand Falls-Windsor
Mayor Fred Best	Eastern Director	Town of Clarenville
Mayor Dianne Whalen	Avalon Director	Town of Paradise
Councillor Peter Miller	St. John's Director	City of St. John's
Deputy Mayor Herb Brett	Small Towns Director	Town of Arnold's Cove
Mayor Dave Denine	Urban Municipalities Director	City of Mount Pearl

The work of the Board is supported by a full-time staff of seven:

Name	Position	E-mail Address
Dr. Patricia Hempstead	Executive Director	phempstead@nlfm.nf.ca
Ms. Christine Carter	Administrative Officer	ccarter@nlfm.nf.ca
Mr. Steve Joy	Finance and IT Coordinator	sjoy@nlfm.nf.ca
Mr. Paul Bailey	Marketing Manager	pbailey@nlfm.nf.ca
Ms. Michelle Strickland	Receptionist	nlfm@nlfm.nf.ca
Ms. Gillian Forward	Marketing Assistant	nlfm@nlfm.nf.ca
Mr. Rod Burke	IT Specialist	nlfm@nlfm.nf.ca

The NLFM offices are currently located at 190 LeMarchant Road, St. John's.

Vision Statement and General Statement of Purpose

The NLFM is guided by a Vision Statement and General Statement of Purpose:

Vision Statement: The purpose of the NLFM is to assist communities in their endeavour to achieve and sustain strong and effective local government, thereby improving the quality of life for all the people of this province.

General Statement of Purpose:

- To provide programs and services of common interest to the members;
- to provide a united approach on issues affecting local governance;
- to advance the ambitions and goals of its member communities by developing a shared common vision of the future;
- to effectively serve as local government spokesperson; and
- to represent its members in matters affecting them or the welfare of their communities; and to further the establishment of responsible government at the local level.

NLFM Web Site

We invite you to visit our Web site at **WWW.nlfm.nf.ca** for further information.

The NLFM office can be reached by e-mail at nlfm@nlfm.nf.ca, phone (709) 753-6820, fax (709) 738-0071, or mail at P.O. Box 5756, St. John's, NF A1C 5X3.

APPENDIX B

Public tenders

214. The execution of public works, the acquisition of goods or services and the leasing of space by a council shall be in accordance with the *Public Tender Act* and in this section, "public works" and "goods or services" have the same meaning as in that Act.

Inspection of documents

* 215. (1) The following documents shall be made available by the council for public inspection during the normal business hours of the council:

(a) adopted minutes of the council;

(b) assessment rolls;

(c) regulations;

(d) municipal plans;

(e) opened public tenders;

(f) financial statements;

(g) auditor's reports;

(h) adopted budgets;

(i) contracts;

(j) orders;

(k) permits;

(l) . repealed

(m) all other documents tabled or adopted by council at a public meeting.

(2) A person making an inspection under subsection (1)

(a) shall not remove the document from the place where it is located or interfere with an employee of the council in the performance of his or her duties; and

(b) may make extracts from the documents, and may, where the council has copying equipment, have a copy made of the documents upon payment of a fee equal to the actual cost of providing that copy.

Copies of documents

* 216. (1) Where an action has begun in a court or the Trial Division and the clerk of a municipality is satisfied or the court or the Trial Division has ordered that an extract from a document in the possession of or under the control of the clerk is required in evidence in the action, the clerk shall, upon payment of a charge that may be prescribed by the council, provide to the person requiring the extract a certified copy of the extract with the seal of the council attached to the extract.

(2) An extract provided under subsection (1) purporting to be certified by the clerk and having the seal of the council attached to it shall be received in evidence as presumptive proof without proof of the appointment or signature of the clerk or the seal of the council.

Authentication of documents

217. (1) All deeds and documents to which the council is a party and to which a seal is necessary shall be authenticated by the seal of the council and the chairperson or mayor, and the clerk, when authorized by the council, shall authenticate the deeds and documents by signing and initialling each page of them.

(2) Where a mayor, chairperson or clerk disqualifies himself or herself from acting as a signatory to a deed or other document to which the council is a party, the council shall appoint a councillor to act as a signatory in the place of the person who disqualifies himself or herself.

Agent

218. A council may act as the agent of the Government of Canada or the province, or another municipality, for the management of property in the municipality owned or leased by that government or municipality, by agreement with that government or municipality.

Joint ventures

219. A council may enter into an agreement with the government of the province, another municipality, agency or person for the joint construction, ownership, maintenance and operation of a facility or service that the council is permitted to construct, own, maintain and operate under this Act.

Plebiscites

220. (1) A council may, by a vote of 2/3 of the councillors in office, hold a plebiscite in the municipality for the purpose of determining the views of the voters in the municipality and may

6. City of Mount Pearl

PRESENTATION

BY

CITY OF MOUNT PEARL

TO THE

FREEDOM OF INFORMATION
REVIEW COMMISSION

PROVINCE OF NEWFOUNDLAND &
LABRADOR

INTRODUCTION

On behalf of the City of Mount Pearl, I wish to commend the Committee on its consultation with municipalities on whether or not they should be included in the proposed Freedom of Information legislation for this province.

The City of Mount Pearl is affected by two pieces of legislation with respect to the dissemination of information to the public: The City of Mount Pearl Act and The Urban and Rural Planning Act 2000.

THE CITY OF MOUNT PEARL ACT

The City of Mount Pearl Act, similar to the Municipalities Act, prescribes in law the documents that must be made available to the public. These documents are required to be available for public inspection and include the following:

- Adopted minutes of the council
- Assessment rolls
- Regulations
- Municipal plans
- Opened public tenders
- Financial statements
- Auditor's report
- Adopted budgets
- Contracts
- Orders
- Permits
- Councillor disclosure statements filed under Section 26, and
- All other documents tabled or adopted by council at a public meeting.

THE URBAN AND RURAL ACT 2000

The Urban and Rural Planning Act 2000 which took effect January 1, 2001requires a consultation opportunity for all interested individuals and groups within the city to provide their input with respect to the preparation or amendment of the City Municipal Plan and its development regulations. This input is at the commencement of the planning process and is prior to the adoption of the plan and its regulations or amendments by the City Council. Following the adoption of the plan and its regulations or amendments, a further opportunity is provided for interested individuals and groups to have input into the process through a public hearing by an independent third party Commissioner appointed by the council. A report with any recommendation arising out of this process is then forwarded to council for its approval.

In addition, the City of Mount Pearl Development Regulations requires that a range of uses that have implications for nearby property owners must go through a public notification process. Development applications which require a variance to the adopted development standards or are identified as nonconforming uses or discretionary uses and to which council has the authority to use its discretionary powers to approve the application is subject to a public briefing session. This process is advertised through the media and circulated to all individuals within 150-meter radius of the proposed development so that all interested individuals and groups may have an opportunity for input into this process prior to Council's consideration of the application. The report from this public briefing session is forwarded to council and its results are then taken into consideration by council in its deliberation as to whether or not they should exercise their discretion and approve the development application.

OPENNESS AND TRANSPARENCY AT THE CITY LEVEL

As is evident above, the City of Mount Pearl is required by law to conduct all its business during public council meetings. The City Act requires that these meetings are open to the public.

The Act does provide the Council with the opportunity to discuss certain matters in private. In accordance with the City of Mount Pearl Act, council has the authority to make decisions at a privileged meeting, which are normally dealing with legal, land acquisition, personnel and collective bargaining issues. However, the Act is quite clear that any decisions made at the privileged meeting, in order to be valid, must be ratified at a subsequent public meeting of the council. This process combined with the provisions of the Urban and Rural Planning Act 2000 and the city's public briefing process, provides the public with a very transparent process whereby they can attend the city's council meetings and observe all decisions of council being made during its public meetings. The minutes of these meetings are also open and available to the general public, following their ratification at a public meeting. In fact, the City of Mount Pearl, posts its public meeting minutes on its web site for the information of its citizens and the general public. This is in addition to a range of information available to the public. We would invite you to visit our web site at www.mtpearl.nf.ca to see what is available and we believe that you will agree that the City of Mount Pearl provides a significant array of information for the benefit of its citizens and the public at large.

The City of Mount Pearl believes that the public has complete access to any required information and all its decisions are made in the public and that access to information is not an issue for the City of Mount Pearl. Any individual requesting information is provided such information in accordance with the City of Mount Pearl Act. Information is provided when requested and we are not aware of any complaints of information not being provided. In view of the process followed by the city, such requests are very minimal.

THE PROVINCIAL GOVERNMENT

We believe the current situation being addressed by your committee has been driven by complaints on the lack of information being provided at the provincial level not at the City of Mount Pearl level. We again believe that this should be the focus of your recommendations and further requirements imposed on the City of Mount Pearl will only increase its administrative burden and cost and therefore is not warranted.

We believe that a Freedom of Information Act with reasonable and timely access to information from the Provincial Government is needed. We also have experienced difficulties in accessing the required information to carry out the City of Mount Pearl's mandate to protect individuals and property within its jurisdiction. When an environmental spill or contamination occurs within the City of Mount Pearl, the city is not provided with detailed information that we believe is necessary to protect the City's infrastructure and the property of its citizens. Spills and/or contamination frequently pose hazards to the city's sewer and storm drainage systems that in turn impact on the homes that are connected to the system. We have found it difficult to receive information from the Provincial Department of Environment on a timely basis (if we are fortunate to receive the information) to expeditiously take any corrective action that may be possible to minimize property damage and protect its infrastructure.

CONCLUDING REMARKS

We respectfully request that you not include the City of Mount Pearl in any proposed Freedom of Information legislation for this province. For your information, I have attached copies of the pertinent sections of the City of Mount Pearl Act and the Urban and Rural Planning Act referenced in my remarks. We thank you for the opportunity to make our views known on this matter.

41. (1) A meeting of the council is open to the public, unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.

(2) Where a meeting is held as a privileged meeting or declared to be a privileged meeting, all members of the public present at the meeting shall leave.

(3) Where a decision is made by the councillors at a privileged meeting, the decision, in order to be valid, shall be ratified at a public meeting of the council.

46. (1) The following documents shall be made available by the council for public inspection during the normal business hours of the council:

(a) adopted minutes of the council;

(b) assessment rolls;

(c) regulations;

(d) municipal plans;

(e) opened public tenders;

(f) financial statements;

(g) auditor's reports;

(h) adopted budgets;

(i) contracts;

(j) orders;

(k) permits;

(l) councillor disclosure statements filed under section 26; and

(m) all other documents tabled or adopted by council at a public meeting.

(2) A person making an inspection under subsection (1)

(a) shall not remove the document from the place where it is located or interfere with an employee of the council in the performance of his or her duties: and

(b) may make extracts from the documents, and may, where the council has copying equipment, have a copy made of the documents upon payment of a fee equal to the actual cost of providing that copy.

Public consultation

14. (1) Where a planning area has been established under section 6 or 11, the council or regional authority responsible for that area shall, during the preparation of a plan and development regulations, provide a consultation opportunity for interested persons, community groups, municipalities, local service districts, regional economic development boards and the departments of the government of the province to

(a) provide input with respect to the proposed development of the regional or municipal plan; and

(b) receive information on the development of the plan and development regulations.

(2) A council or regional authority may request that written comments and questions be submitted with respect to the development of a plan.

(3) Consultation under this section shall

(a) accommodate the size, structure and complexity of planning and policy issues that exist in the planning area under consideration; and

(b) include the presentation of relevant land use and other studies and surveys respecting the development and preparation of the plan.

Review of plan

15. (1) After a consultation has taken place under section 14, a council or regional authority shall complete the proposed plan and development regulations in accordance with this Act.

(2) A council and a regional authority shall, in the required form, submit a proposed plan and development regulations to the department for review.

(3) Upon receipt of a proposed plan and development regulations submitted under subsection (2), the department shall review the plan and regulations to determine provincial and other government agency interests and may consult with departments and agencies of the province with respect to those plans and regulations.

(4) Comments received by the department as a result of consultations under subsection (3) shall be forwarded to the regional authority or council to which they apply.

(5) A plan submitted under subsection (2) shall

(a) include the proposed completed plan and regulations; and

(b) include documentation with respect to consultations held under section 14.

(6) The department may recommend a change and amendment to a proposed plan and development regulations submitted under subsection (2).

Adoption of plan

16. (1) Following a review under subsection 15(3), a council and a regional authority may, by a majority vote of their members,

(a) adopt the proposed plan and development regulations; or

(b) where the department has recommended a change under subsection 15(6), adopt the proposed plan and development regulations amended in accordance with that recommendation.

(2) A council and a regional authority shall submit, in the required form, the number of copies of the plan and development regulations adopted under subsection (1) that the minister may require.

Notice of adoption

17. (1) Where a proposed plan and development regulations have been adopted under subsection 16(1), a council or regional authority shall give notice of that adoption by advertisement inserted twice in a newspaper circulated in the affected area and the first advertisement shall be published not fewer than 14 days before the date fixed under section 18 for the hearing of objections to and representations on the proposed plan and regulations.

(2) Notwithstanding subsection (1), where the minister, a council or regional authority considers it necessary that a proposed plan or development regulations or an amendment to these have more than 14 days public notice before the date fixed under section 18 for the hearing of objections, a greater notice period may be required.

(3) The notice shall state the place and time during which the proposed plan and development regulations may be inspected and the place and time set for the hearing of representations and objections.

(4) A council and a regional authority shall allow the inspection of the proposed plan and development regulations from the time of the first publication of the notice under subsection (1) until the date fixed for the hearing of the matter.

Public hearing

18. (1) Where a proposed plan and development regulations have been adopted under subsection 16(1), a council or a regional authority shall set a date, time and place for the holding of a public hearing to consider objections and representations which may be made by a person or association of persons to the plan or development regulations or a part of them.

(2) A public hearing referred to in subsection (1) shall be held within the area under the jurisdiction of the applicable council or regional authority.

Commissioner and hearing

19. (1) Where a proposed plan and development regulations have been submitted under subsection 16(2), a council or regional authority shall appoint a commissioner and may appoint one other person that is considered necessary to help the commissioner in holding a public hearing and to complete a report on that hearing.

(2) A commissioner appointed under subsection (1) has, for the purpose of a public hearing under this Act, the same powers as a commissioner under the *Public Inquiries Act.*

(3) A commissioner is entitled to reimbursement for costs and expenses and shall be remunerated in the manner that the minister may establish.

(4) The council or regional authority shall, within 30 days of receiving an invoice for remuneration, costs and expenses, pay to the commissioner the remuneration, costs and expenses related to the public hearing conducted by him or her.

(5) Remuneration, costs and expenses paid under this section shall be a first charge of the commissioner against the council or regional authority.

(6) A commissioner appointed under subsection (1) shall not be a member or an employee of a council or regional authority in the province.

Objections and representations

20. Not fewer than 2 days before the date set for the public hearing, a person or an association of persons may submit to the appropriate council or regional authority 2 signed, written statements of objections and representations with respect to a plan, development regulations or a part of them.

Public hearing

21. (1) Where no objection is made under section 20, the council or regional authority may cancel the public hearing.

(2) On the date and at the time fixed for the public hearing, the commissioner shall proceed with the hearing and shall hear objections and representations orally or in writing under oath or affirmation.

Report

22. (1) Where a public hearing held under this Part is completed, the commissioner shall in the case of a plan and development regulations referred to in subsection 16(2), submit a written report on the public hearing to the council or regional authority together with 2 copies of evidence taken at the public hearing.

(2) In a report submitted under subsection (1), a commissioner shall set out in detail his or her recommendations respecting objections and representations considered by him or her at the public hearing together with reasons and a statement showing objections and representations that came to the attention of the commissioner but were not considered together with the reasons why they were not considered.

Approval of report by council

23. (1) Where a report is submitted to a council or regional authority under subsection 22(1), the council or regional authority shall consider the report and

(a) where it considers it necessary, make changes to the plan and development regulations; and

(b) may withdraw the submitted plan and development regulations.

(2) Where changes are made to the plan or development regulations under subsection (1), a new public hearing may be held with respect to the changes and sections 18 to 22 shall apply to those changes.

(3) Where changes are not made under subsection (1) or where changes are made

(a) without further reference to a public hearing; or

(b) a changed plan or development regulations have been reported on and submitted to the regional authority or council under subsection 22(1),

the council or regional authority shall consider and approve the plan or development regulations as submitted or as amended.

(4) Two copies of a plan and development regulations, in the required form, as submitted or amended and approved under subsection (3) shall be submitted to the minister together with the commissioner's report, objections and representations.

7. City of St. John's

BRIEF

FREEDOM OF INFORMATION REVIEW COMMITTEE

Thank you for the opportunity to present a brief to the Freedom of Information Review Committee.

I am pleased that Government is reviewing the Act which was enacted some thirty years ago when the concept of freedom of information was in its infancy. Governments' announced initiative to restore the office of the Ombudsman, as an officer of the House of Assembly, is also welcomed particularly if that officer is also given the right to review decisions of government refusing to provide access to information.

I also appreciate the Committee advising the City of the application of Freedom of Information Acts to municipalities in most jurisdictions and seeking the views of the City of St. John's on the application of the Newfoundland legislation to local governments.

I wish to provide the views of the City on four aspects of Freedom of Information legislation:

1. The public policy purposes of freedom of information;
2. The exclusion of cabinet confidences;
3. An expeditious and inexpensive appeal process; and
4. The application of the Act to municipalities.

There are, of course, other important issues concerning personal information, legal advice and commercial interests which require careful consideration.

Public Policy Purposes of Freedom of Information

The public policy purpose of freedom of information legislation is to ensure that debate on public policy issues is informed by full possession of the facts by the public thereby providing full accountability on the part of Government.

A fully functioning democracy requires an engaged and informed citizenry. Unless governnment shares the information it has accumulated at public expense with the public, it is not possible for fruitful and informed public debate to take place.

I give as an example the debate about the recent ill-advised decision of Government to relocate public servants from St. John's to other areas of the province.

Because of the implications of the decisions for residents of the City and for the efficient delivery of public services, Council took a decision to actively oppose the decision. As part of that decision, I asked for certain factual information and reports about the following issues:

> "*1.* *The estimated $7 million cost of the relocation.*
> *2.* *Any analysis of NAPE's estimated cost of between $23 and $25 million.*
> *3.* *The cost of moving laboratories.*
> *4.* *Costs of renting space for the library services.*
> *5.* *Soil tests on the ground designated for the new hanger in Gander and the estimated costs of remediation.*
>
> *In his response the Premier denied the request on the following basis:*
>
> > *"The particulars of this matter were prepared for Cabinet consideration and used for consultations among ministers for the purpose of government decision making."*

The Premier's response did not deal with the specific requests or even if the reports or information actually existed. We now know, because of the Premier's response in the House of Assembly that there were no reports, which is useful information itself because it demonstrates the quality of the decision making process.

The Committee will note that the City did not ask for the memorandum to Cabinet, it only asked for factual information on the relocation issue.

Similar requests from the Telegram and NAPE were also denied.

Cabinet Confidences

I recognize that all Freedom of Information legislation restricts access to cabinet confidences. This is based on the Cabinet system of government where, as set out in the federal policy, "responsibility rests not in a single individual, but on a committee of ministers sitting in Cabinet. As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality. This rule protects the principle of the collective responsibility of ministers by enabling them to support government decisions, whatever their personal views. The rule also enables ministers to engage in full and frank discussions necessary for effective functioning of a Cabinet system of government".

The fundamental issue for the Committee is how wide the net of cabinet confidences should extend. I believe that the present exceptions based on cabinet confidences is far too wide, as evidenced by the attitude of government on the release of information about the relocation of civil servants.

There is a natural tendency on the part of governments to operate in secrecy and to this end frame reports in such a way that they attract the protection of section 9 of the Act and as a result cannot be released. The experience in Newfoundland demonstrates that this is what is happening here; as the Committee can see from the Government's response to our request for information on the relocation decision.

The Australian Freedom of Information Act does not provide an automatic exemption for internal working documents and recognizes that background information of a factual nature can be released.

The Williams Commission, which examined the Ontario Freedom of Information Act, recommended a narrow definition of what should be protected and suggested that background material should be released. This approach was adopted in the Ontario legislation, which permits the disclosure of background and analyses submitted or prepared for Cabinet once the decision to which they relate has been made and implemented.

Similar provisions are included in the legislation of other jurisdictions, such as British Columbia, Alberta and Nova Scotia and they are a move in the right direction.

Unfortunately, I don't feel that this approach goes far enough, because the background information is only released once a decision has been made and after the opportunity to influence a decision has been lost. The result is that the debate is focused on whether a policy decision is the right one rather than on what the best policy should be. That requires a shift in how government formulates public policy.

The Appeal Process

The current appeal process to a judge of the Trial Division is expensive and time consuming and is only available to applicants with deep pockets. Prior to the repeal of the Parliamentary Commissioner (Ombudsman) Act in 1990, there was a right to appeal a refusal to release information to the Ombudsman, who had the authority to investigate and make a recommendation on whether the requested information should be released. I support a return to that system.

The Government has announced that it will re-establish the office of the Ombudsman as an officer of the House of Assembly. Given the size of our jurisdiction and the likely small number of appeals, the creation of another office of Information Commissioner would not be warranted and I believe that those duties should be added to those of the Ombudsman.

I also believe that the powers of the Ombudsman should be strengthened so that he or she has the authority to order the release of information, subject only to a right of appeal to the Courts.

Application of the Act to the City

The City of St. John's prides itself on its policy of open government and full access to information. Our Freedom of Information By-Law (attached) provides that "only matters of a personnel or legal nature, intergovernmental matters where discussion at a public meeting would be prejudicial to the interests of the citizens of the City or the Province and recommendations of the Payment Review Board" are considered at Special meetings of Council. Our committee meetings are open to the public, tax concessions must be publicly debated, travel expenditures are published as well as the salaries paid Councillors and to employees who are paid more than $50,000 a year.

Requests for information must be complied with within 72 hours and virtually all information kept by City Hall is made available, with the exception of matters which would be placed on the Agenda of the Special Meeting, and personal information.

The City has no difficulty in having a reformed Freedom of Information Act apply to it, so long as it is no less restrictive than our current By-Law and policies and we would wish to be fully consulted on the content of such legislation.

Conclusion

In summary, I support a much narrower definition of what constitutes cabinet confidences by authorizing the release of background information once a decision has been made. I also urge the Committee to recommend to Government that it engage public debate on proposed public policy initiatives prior to decisions being made through the general prior release of background information.

I support the re-establishment of the office of Ombudsman and a right of appeal to the Ombudsman on a refusal to release information, with the Ombudsman being granted the authority to order the release.

I also have no difficulty in having the Act apply to the City so long as it does not impede access to information.

Possession of the facts about public policy issues can only serve to improve the quality of public debate and ultimately the quality of government decision making.

I wish to thank you for your consideration of the points I have raised about this important matter and I look forward to seeing your report.

BY-LAW NO. 1331

AMENDMENT NO. 1334, 1417

FREEDOM OF INFORMATION BY-LAW

PASSED BY COUNCIL ON JANUARY 10, 1994

Under and by virtue of the powers conferred by The City of St. John's Act, the St. John's Municipal Council in regular session convened on this 10th day of January, A.D., 1994, hereby passes and enacts the following by-law for the purpose of ensuring freedom of information for the general public of the City of St. John's.

FREEDOM OF INFORMATION BY-LAW

1. Public and Private Meetings

1.1 Only matters of a personnel or legal nature, intergovernmental matters where discussion at a public meeting would be prejudicial to the interests of the citizens of the City or the Province and recommendations of the Payment Review Board shall be placed on the agenda for Special Meetings of Council; and discussion of these matters shall be confined to Special Meetings of Council. (05/24/94; #1334)

1.2 All matters not encompassed by the provisions of Section 1.1 shall be placed on the agenda for Public Meetings of Council.

1.3 In the event of a dispute as to whether or not a matter should be placed on the agenda for a Special Meeting of Council or on the agenda for a Public Meeting of Council, a majority vote of Council at a public meeting of Council shall determine the appropriate agenda. (05/24/94; #1334)

2. A Councillor shall not have access to the personnel files of City employees without the approval of Council. (04/20/99; #1417)

3. Committee Reports

3.1 All Committee meetings of Council shall be open to the public. Should a dispute as to confidentiality of a matter arise at a Committee meeting, a majority vote of Committee Members shall be required to exclude the public from the said meeting.

3.2 In the event that a matter is declared confidential, such declaration must be reported to Council in the form of a Committee report. A majority vote of Council shall then be required if such confidentiality is to continue.

4. Collective Agreements, Employment Contracts

4.1 All collective agreements and any individual contracts of employment shall be entered into the public record of the City.

4.2 It shall be a violation of this By-Law for Council to vote for any financial benefit to any Member of Council or any member of Staff at a private meeting.

4.3 All individual contracts of employment shall be placed on the agenda of a public meeting of Council for its consideration and decision.

(05/24/94; #1334)

5. Tax Concessions

5.1 Corporations seeking tax concessions must be prepared to publicly justify their case; and no discussions of tax concessions shall be permitted at Special Meetings.

5.2 All Council votes on tax concessions must be preceded by a four week notice to the general public of such vote.

6. General

6.1 Travel expenditures by Council and Senior Staff shall be itemized and published quarterly. Itemization of all out of province travel expenditures shall include the following:

i) name of person travelling;
ii) event attended;
iii) location of event attended; and
iv) total cost of trip.

6.2 Council shall annually publish a list of salaries paid to the Mayor and Council, salaries paid to any classification of $50,000 a year or more, and any other remuneration paid to the Mayor, Council and Senior Staff. The salary range of any employee of the City shall also be made available on request.

7. **Access to Information Requests**

Requests, in writing, for information shall be made at the City Clerk's Office. All requests for information will be complied with within 72 hours. If compliance is not legitimately possible within 72 hours, the Clerk shall inform the party making the request as to when the information will be available. In the case of a dispute, the person seeking information may bring the matter to the attention of Council for a vote.

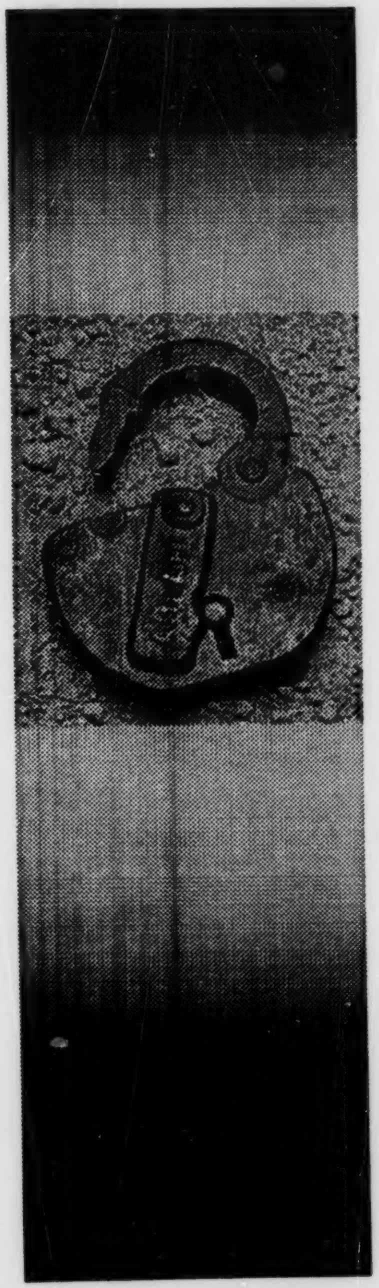
8. **Amendments to the Freedom of Information By-Law**

A 2/3 vote of Council is required to amend the provisions of this By-Law.

9. This By-Law applies to all boards, commissions and committees appointed by Council.

(05/24/94; #1334)

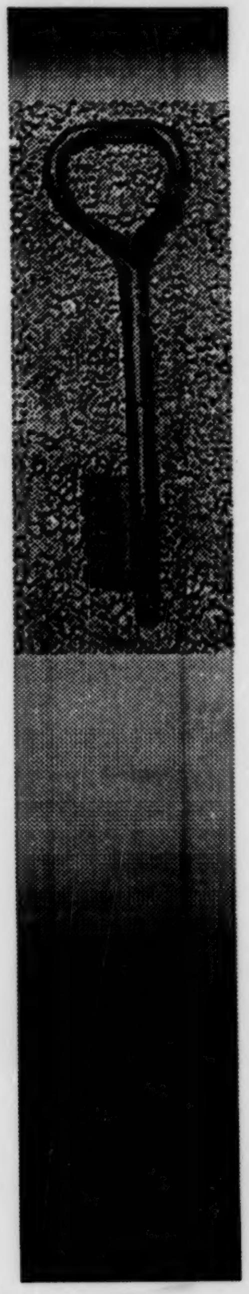
8. Office of the Auditor General of Newfoundland



Office of the Auditor General of Newfoundland

Presentation to the Freedom of Information Review Committee

March 2001



Freedom Of Information

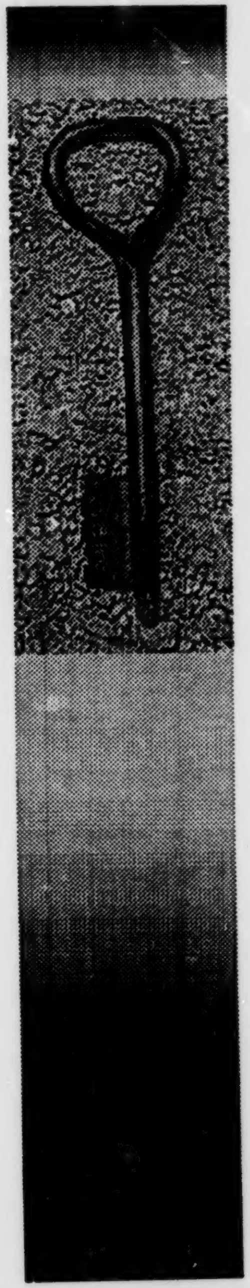
- There are two aspects to freedom of information:

➢ Access

Freedom of Information Act

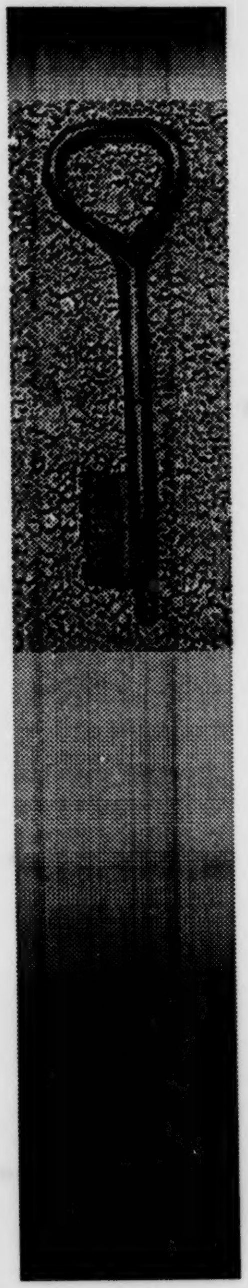
➢ Privacy

The Privacy Act



Freedom Of Information

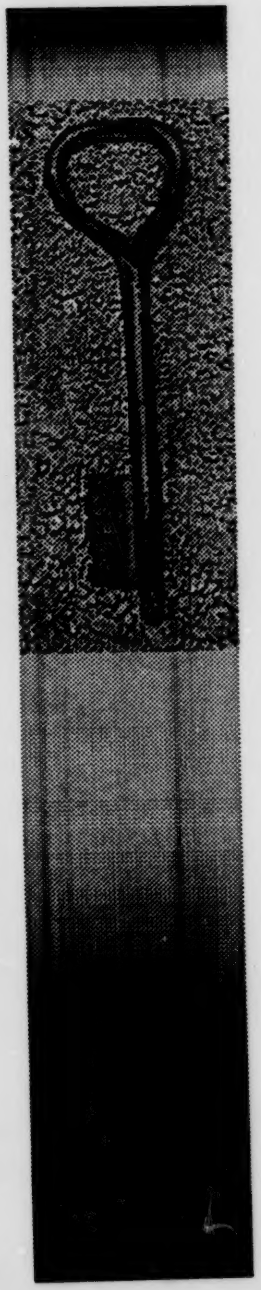
- All other Provinces have an Information and Privacy Commissioner or equivalent.



Freedom Of Information

◆ What do the other jurisdictions have?

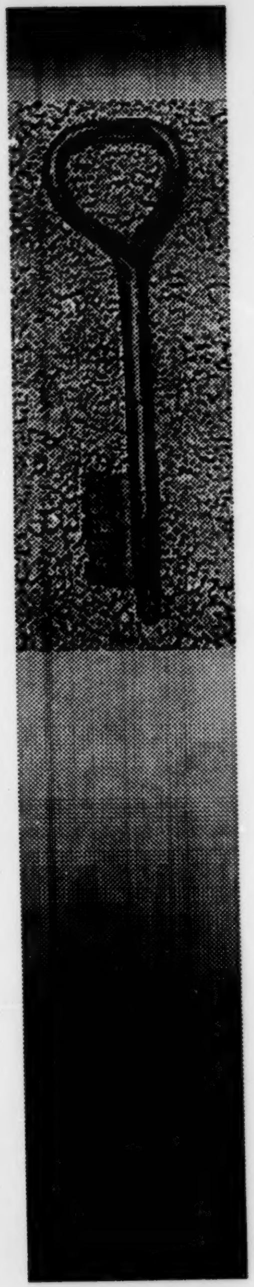
➢ BC	Information and Privacy Commissioner (1 Act)
➢ AB	Information and Privacy Commissioner (1 Act)
➢ SK	Information and Privacy Commissioner (1 Act)
➢ MA	Ombudsman (1 Act)
➢ ON	Information and Privacy Commissioner (1 Act)
➢ PQ	Commissioner (1 Act)
➢ NB	Ombudsman (2 Acts)
➢ NS	Review Officer (1 Act)
➢ PE	Information and Privacy Commissioner (Bill before House Dec 2000 for 1 Act)
➢ CA	Office of the Information Commissioner and a separate Privacy Commissioner (2 Acts)
➢ NF	Nothing (2 Acts)



Freedom Of Information

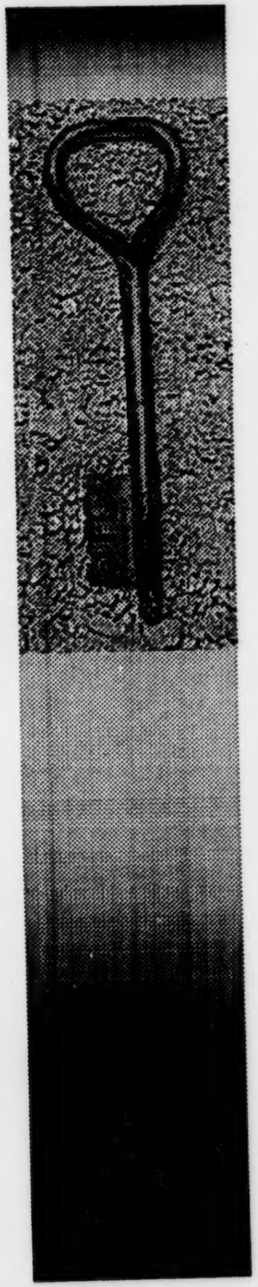
General Comments

Office of the Auditor General



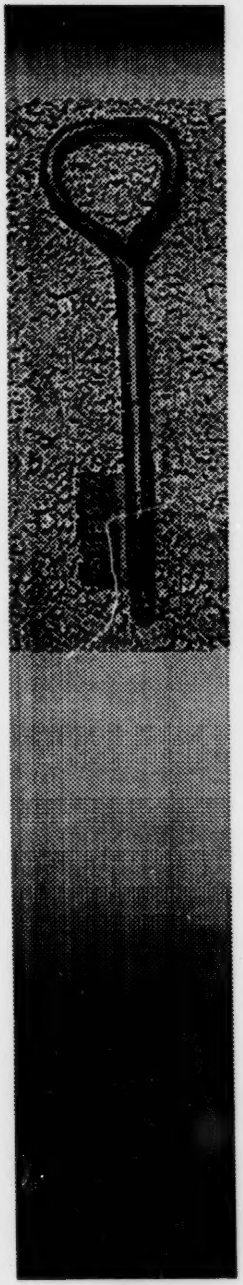
Freedom Of Information

- Section 5 of the *Freedom of Information Act* requires the Lieutenant-Governor to publish a list of the general class of information prepared by or under the control of the Department. The term “general class of information” is not defined, but should be.



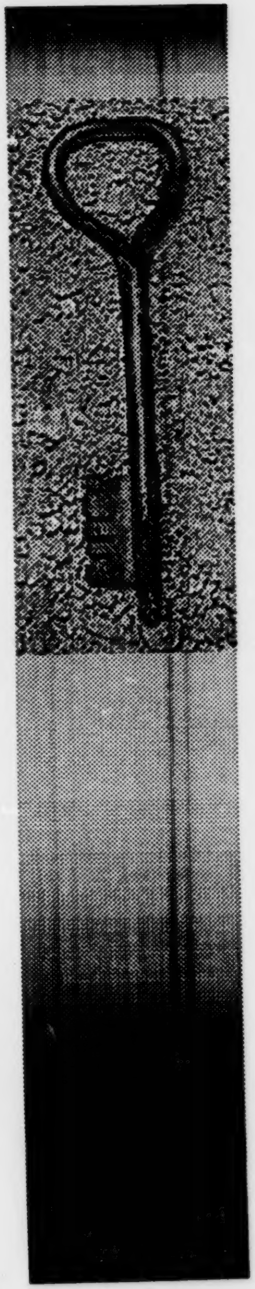
Freedom Of Information

- There is no requirement in the *Freedom of Information Act* for a Department to maintain a listing of requests for information.
- There is no “formal” central registry in Government of requests to information. Cabinet Secretariat does have an “informal” registry. Informal in that it may not be complete if a Department does not forward information on all requests.



Freedom Of Information

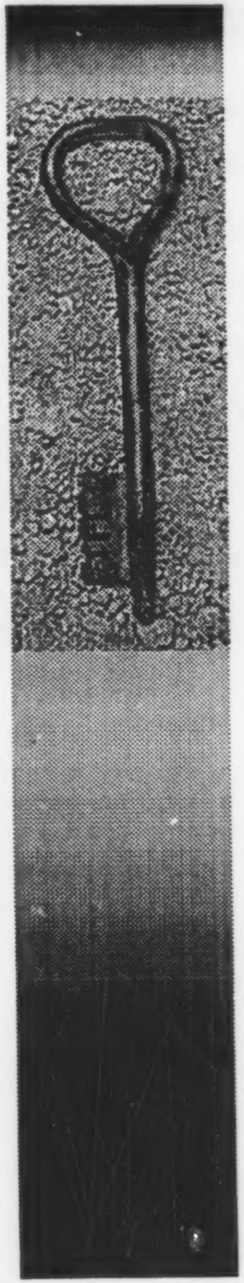
- ◆ There is a perception that Departments look at every available loop hole to avoid providing the information requested.
- ◆ Not all requests to information are being addressed in accordance with the 30 day requirement of Section 7 of the *Freedom of Information Act*.



Freedom Of Information

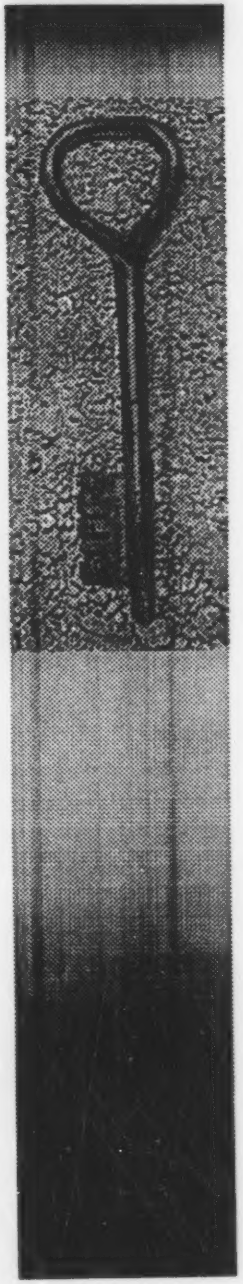
- Creative accounting can influence what is provided in response to a request. For example, if a search of Government's financial system is performed by vendor number, not all transactions related to that vendor will necessarily be identified.

- Government's records management does not facilitate the identification and retrieval of all relevant information related to a request for information.



Freedom Of Information

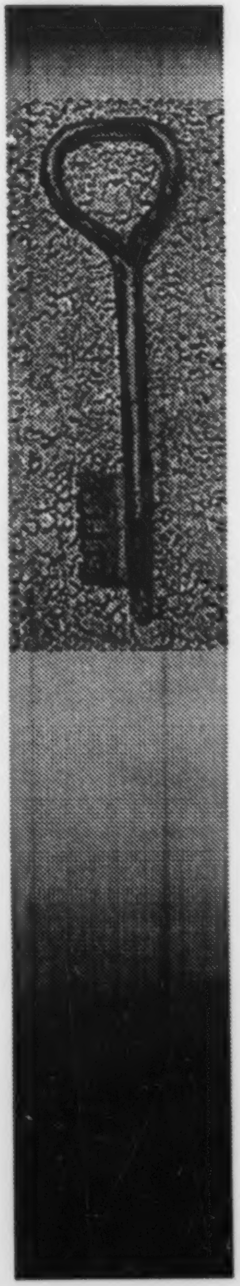
- Not all entities are covered under the *Freedom of Information Act*. Of the 84 Crown agencies which have their own financial statements, only 26 are covered by the *Freedom of Information Act*. For example, Hydro and school boards are not included in the Schedule.



Freedom Of Information

- Section 8(1)(a) of the *Freedom of Information Act* refers to a prescribed fee in order to inspect the information and a prescribed cost of reproduction.

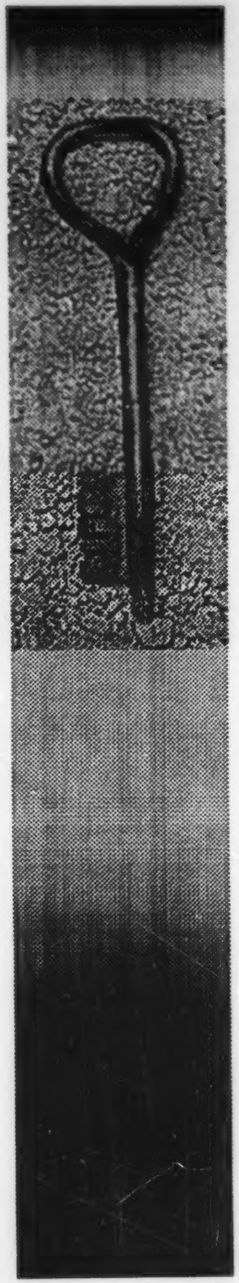
- Section 16.1 of the *Freedom of Information Act* states that the Minister may set fees for providing information requested. Are the fees calculated in a consistent manner by Departments? Is the fee structure reasonable?



Freedom Of Information

- The current remedy available if a request to information is refused is contained in Section 12 of the *Freedom of Information Act* and requires a person to appeal the decision to the Trial Division.

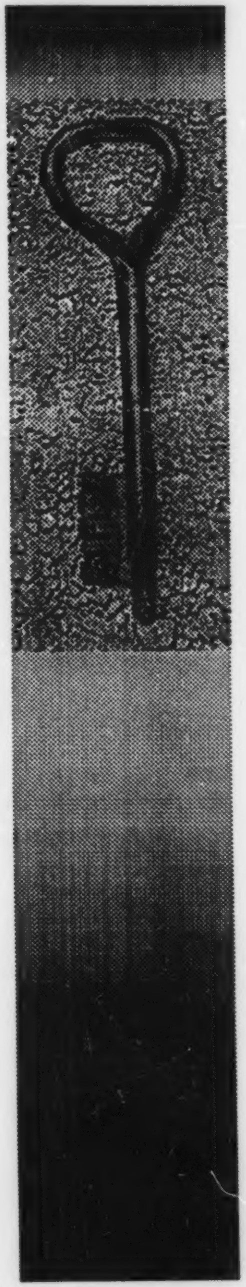
- The current remedy available for an action for violation of privacy is contained in Section 8 of the *Privacy Act* which states that the action shall be heard and determined by the Trial Division.



Freedom Of Information

- Section 19 of the *Auditor General Act* states in part that the Auditor General shall not be permitted access to information in the records listed in paragraphs 9(1)(b) to (f) of the *Freedom of Information Act*.

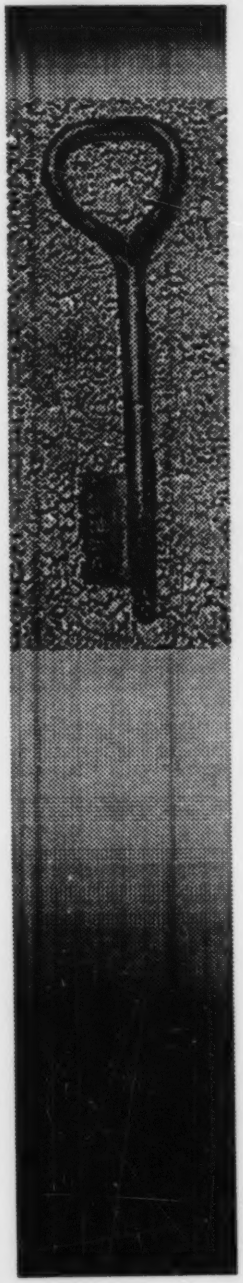
This Section is used **(or abused)** in many instances to restrict our access to information.



Freedom Of Information

- There are many new privacy issues as a result of technology. For example:

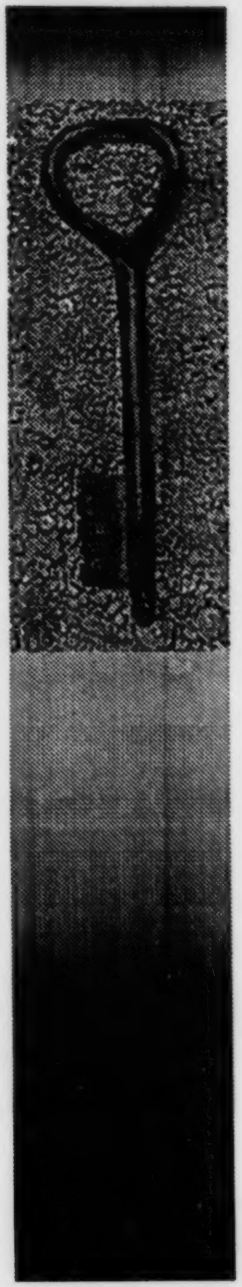
➢ **Internet** - Use of the internet can be tracked and recorded. It is also possible to obtain significant amounts of information from an internet browser's computer.



Freedom Of Information

- Privacy issues (continued):

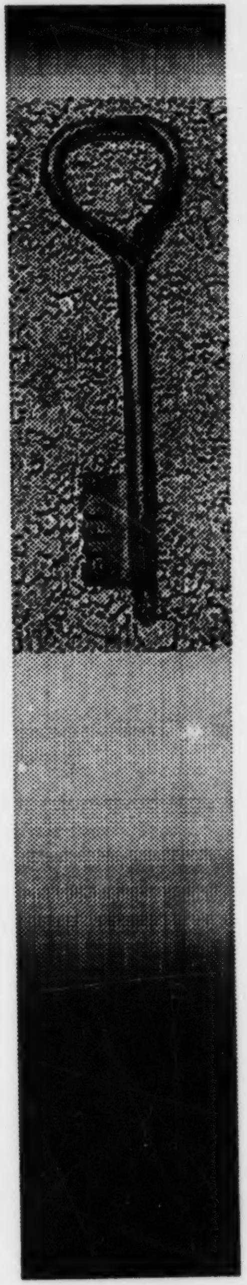
➢ **Surveillance** – Surveillance is becoming increasingly widespread. Employers can monitor employee activities by tracking keystrokes on computers, accessing voice mail and e-mail systems, and monitoring the location of employees and vehicles through the use of global positioning systems.



Freedom Of Information

- Privacy issues (continued):

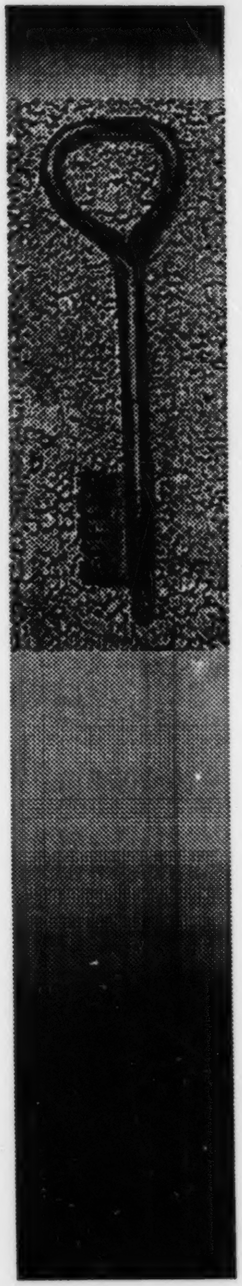
➢ **Biometrics** – This involves the identification of an individual using some unique physical characteristic such as a fingerprint or retinal scan. The risk is that this lifetime identifier will be used to link other sets of information to a recognizable individual.



Freedom Of Information

◆ Privacy issues (continued):

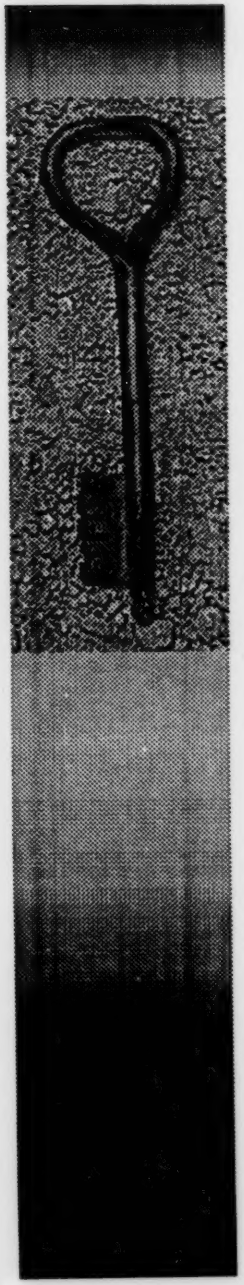
➢ **Convenience/loyalty cards** – Users of these cards provide their purchasing patterns which are often combined with other information provided by the customer in return for discounts on products or services. Are users of these cards aware of the purpose for which the information will be used and by whom?



Freedom Of Information

- Privacy issues (continued):

- ➢ Government has recently established a LAN Desk technology which provides the ability to monitor all computers logged into Government's LAN Systems.
  - ➢ What will be monitored?
  - ➢ What information will be gathered?
  - ➢ Who will have access to the information?
  - ➢ What will the information be used for?
  - ➢ Will employees know?

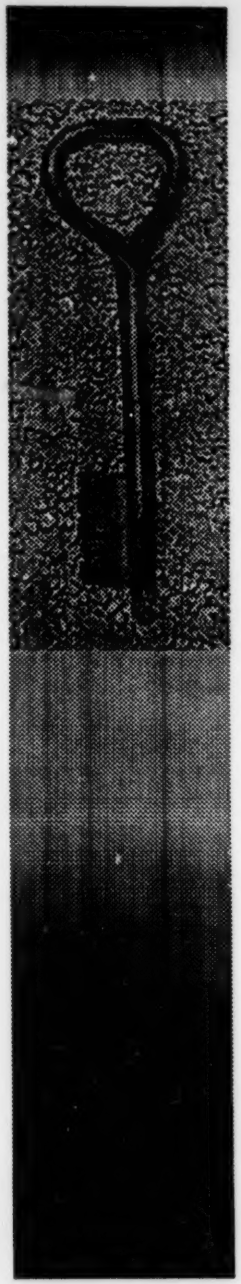


Freedom Of Information

- What we believe is necessary to support the *Freedom of Information Act*:

➢ There should be a person or division within Government responsible for providing services, support and leadership to Departments and Crown agencies to assist them in complying with the *Act*.

(Continued)

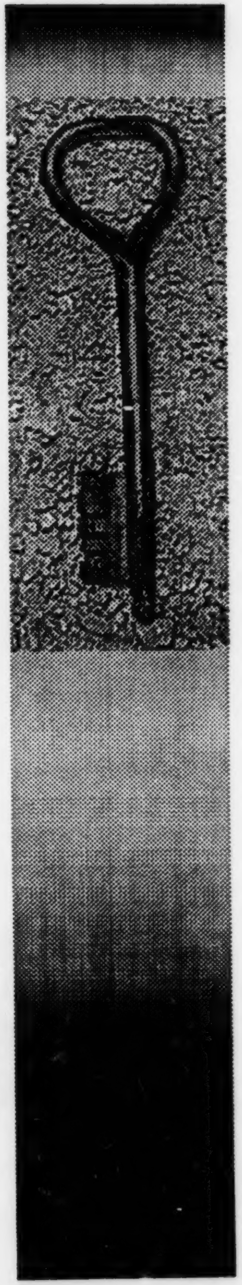


Freedom Of Information

(Continued)

- ➢ There should be training for those required to comply with the *Act*.
- ➢ There should be education for the public.

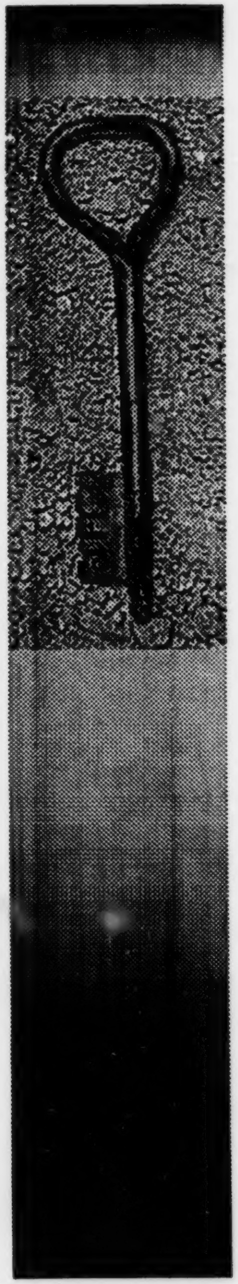
(Continued)



Freedom Of Information

(Continued)

- There should be policies and procedures covering issues such as exceptions to the *Act*, the fee structure and administrative issues.
- There should be a requirement in the *Act* that Government table an annual report in the Legislature which reports in detail on Government's compliance with the *Act*.



The End

Agencies of the Crown Covered by the Freedom of Information Act

Department of Development and Rural Renewal
1. Enterprise Newfoundland and Labrador Corporation
2. Farm Development Loan Board
3. Fisheries Loan Board of Newfoundland

Department of Education
4. Memorial University of Newfoundland
5. The Provincial Information and Library Resources Board
6. The College of the North Atlantic

Department of Environment and Labour
7. Workplace Health, Safety and Compensation Commission

Department of Finance
8. Newfoundland Industrial Development Corporation
9. Newfoundland Liquor Corporation
10. Newfoundland Municipal Financing Corporation

Department of Forest Resources and Agrifoods
11. Newfoundland Farm Products Corporation

Department of Government Services and Lands
12. Board of Commissioners of Public Utilities

Department of Health and Community Services
13. Newfoundland Cancer Treatment and Research Foundation
14. The Newfoundland Medical Care Commission
15. Avalon Health Care Institutions Board
16. Central East Health Care Institutions Board
17. Central West Health Corporation
18. Grenfell Regional Health Services Board
19. Health Care Corporation of St. John's
20. Health Labrador Corporation
21. Peninsulas Health Care Corporation
22. Western Health Care Corporation
23. St. John's Nursing Home Board

Agencies of the Crown Covered by the Freedom of Information Act
(Continued)

Department of Industry, Trade and Technology
24. Newfoundland Hardwoods Limited

Department of Municipal and Provincial Affairs
25. Newfoundland and Labrador Housing Corporation

Department of Works, Services and Transportation
26. C.A. Pippy Park Commission

Agencies of the Crown
Not Covered by the Freedom of Information Act

Department of Development and Rural Renewal

1. Newfoundland and Labrador Film Development Corporation

Department of Education

2. Newfoundland and Labrador Education Investment Corporation
3. The Private Training Corporation
4. Literacy Development Council of Newfoundland and Labrador
5. Memorial University of Newfoundland Pension Plan
6. Conseil Scolaire Francophone Provincial de terre-Neuve et du Labrador
7. District #1 - Labrador
8. District #2 - Northern Peninsula/Labrador South
9. District #3 - Corner Brook/Deer Lake/St. Barbe
10. District #4 - Cormack Trail
11. District #5 - Baie Verte/Central/Connaigre
12. District #6 - Lewisporte/Gander
13. District # 7 - Gander
14. District # 8 - Vista
15. District # 9 - Avalon West
16. District # 10 - Avalon East

Department of Environment and Labour

17. Multi-Materials Stewardship Board
18. Multi-Materials Stewardship Board Waste Management Trust Fund

Executive Council

19. Advisory Council on the Economy
20. Labrador Transportation Initiative Fund
21. Provincial Advisory Council on the Status of Women

Department of Finance

22. Hotel Buildings Limited
23. Newfoundland Government Fund Limited
24. Newfoundland Government Sinking Fund
25. The Province of Newfoundland Pooled Pension Fund
26. Marble Mountain Development Corporation
27. Marble Mountain Management Corporation

Agencies of the Crown
Not Covered by the Freedom of Information Act
(Continued)

Department of Forest Resources and Agrifoods
28. Livestock Owners Compensation Board
29. Newfoundland Crop Insurance Agency

Department of Government Services and Lands
30. Public Accountants' Licensing Board
31. Credit Union Deposit Guarantee Corporation

Department of Health and Community Services
32. Newfoundland and Labrador Centre for Health Information
33. Provincial Genetics Program
34. Provincial Perinatal Program
35. Public Health Laboratory
36. Central Regional Health and Community Services Board
37. Eastern Regional Health and Community Services Board
38. St. John's Regional Health and Community Services Board
39. Western Regional Health and Community Services Board
40. Pentecostal Assemblies - Clarke's Beach Senior Citizens Home

Department of Industry, Trade and Technology
41. Bull Arm Site Corporation
42. Newfoundland Ocean Enterprises Limited
43. Operation ONLINE Inc.

Department of Justice
44. Director of Support Enforcement
45. Newfoundland Legal Aid Commission
46. Office of the High Sheriff
47. Registrar of the Supreme Court of Newfoundland

Department of Mines and Energy
48. Churchill Falls (Labrador) Corporation Limited
49. Gull Island Power Company Limited
50. Lower Churchill Development Corporation Limited
51. Newfoundland and Labrador Hydro Electric Corporation
52. Twin Falls Power Corporation Limited

Agencies of the Crown
Not Covered by the Freedom of Information Act
(Continued)

Department of Municipal and Provincial Affairs

53. Municipal Assessment Agency

Department of Tourism, Culture and Recreation

54. Heritage Foundation of Newfoundland and Labrador
55. The John Cabot (1997) 500th. Anniversary Corporation
56. Newfoundland and Labrador Arts Council
57. Newfoundland and Labrador Heritage Corporation
58. Special Celebrations Corporation of Newfoundland and Labrador Inc.

Agencies of the Crown and Other Entities Which Do Not Produce Separate Financial Statements

Department of Education

1. Arts and Letters Committee
2. Curriculum Association
3. Newfoundland and Labrador Educational Communications Corporation
4. Provincial Apprenticeship Board
5. Scholarship Committee
6. School Insurance Committee
7. Student Aid Appeal Committee
8. Teachers' Certification Committee
9. Vocation Instructors Accreditation Committee

Department of Environment and Labour

10. Appeal Tribunal for Buildings Accessibility
11. Boiler and Pressure Vessel Advisory Board
12. Buildings Accessibility Advisory Board
13. Human Rights Code Adjudicative Panel
14. Labour Standards Panel of Adjudicators
15. Manpower Training and Certification Board
16. Occupational Health and Safety Advisory Council
17. Pesticides Advisory Board
18. Salary and Benefits Tribunal - Provincial Court
19. Workers' Compensation Appeal Tribunal

Executive Council

20. Classification Appeal Board
21. Pension Policy Committee
22. Provincial Bravery Award Review Panel
23. Pensions Investment Committee

Department of Fisheries and Aquaculture

24. Processing Licensing Appeals Committee
25. Redundancy of Salt Fish Premises Board
26. Scallop Hatchery Board

Agencies of the Crown and Other Entities Which Do Not Produce Separate Financial Statements
(Continued)

Department of Forest Resources and Agrifoods
27. Agriculture Products Marketing Board
28. Chicken Marketing Board
29. Forest Land Tax Appeal Board
30. Milk Marketing Board
31. Newfoundland and Labrador Veterinary Licensing Board
32. Timber Scalers Board

Department of Government Services and Lands
33. Driver's License Suspension Review Board
34. Driver Medical Advisory Board
35. Highway Safety Advisory Board
36. Insurance Agents Appeal Board
37. Lotteries Licensing Review Board Panel
38. Newfoundland and Labrador Geographical Names Board
39. Real Estate Advisory Board
40. Real Estate Foundation of Newfoundland

Department of Health and Community Services
41. Embalmers and Funeral Directors Board
42. Mental Health Review Board
43. Welfare Institutions Licensing and Inspection Authority

Department of Human Resources and Employment
44. Daycare and Homemaking Services Licensing Board
45. Social Assistance Appeal Board

Department of Industry, Trade and Technology
46. Edge Evaluation Board
47. Management Committee (SIID Agreement)

Agencies of the Crown and Other Entities Which Do Not Produce Separate Financial Statements

(Continued)

Department of Justice
48. Corrections Board
49. Criminal Code Mental Disorder Review Board (Section 672 Criminal Code)
50. Electoral Districts Boundaries Commission
51. Judicial Council of the Provincial Court of Newfoundland
52. Newfoundland Law Reform Commission
53. Panel of Adjudicators (RNC)
54. Public Complaints Commission (RNC)

Department of Mines and Energy
55. Mineral Rights Adjudication Board
56. Newfoundland and Labrador Petroleum Corporation

Department of Municipal and Provincial Affairs
57. Fire Prevention Act Advisory Council
58. Regional Appeals Board

Department of Tourism, Culture and Recreation
59. Public Records Committee
60. Wilderness and Ecological Advisory Council

9. The Institute for the Advancement of Public Policy

The Institute for the
Advancement of Public Policy

Submission to the Freedom of Information Review Committee

on the Occasion of its Review of the *Freedom of Information Act and Regulations* (Newfoundland and Labrador)

Presented by John G. Abbott and Colleen Hanrahan

St. John's, Newfoundland

March 16th, 2001

P.O. Box 23005, Churchill Square Postal Outlet, St. John's, Newfoundland A1B 4J9
Tel 709·739·0833 ❧ Fax 709·739·0832 ❧ e-mail: abbhan@thezone.net

The Institute for the Advancement of Public Policy, Inc. *is a St. John's-based private consulting firm specializing in comprehensive public policy research and analysis along with advisory, advocacy, professional development and management consulting services designed to advance a client's interests in relation to public policy.*

Our presentation is intended not to provide recommendations, per se, but to outline some considerations for the Review Committee as it tackles the thorny but complex issues in the public policy field of freedom of information.

Note: The presenters wish to acknowledge the contribution to this paper by Ms. Helene Davis, an associate of *The Institute for the Advancement of Public Policy, Inc.*

Introduction

The Institute for the Advancement of Public Policy, Inc. appreciates this opportunity to make a submission to the Freedom of Information Review Committee during its current public consultations. Our position is that the government must foster the development of a culture of greater openness and transparency in regard to its operations and decision-making processes, with a view to increasing its accountability to the citizens of the province. Freedom of information (FOI) or access to information (ATI) legislation is meant to contribute to that culture of greater openness and transparency. We present below several measures that we believe can contribute to the efficacy of the legislation, and to the desired openness and transparency in government operations in this province.

Political Leadership

Some of the literature on freedom of information proposes the re-education of civil (or public) servants about the issues involved in freedom of information legislation, so that they may become less apprehensive about the possibility of reprisals for revealing information (Reid, 2000, p.7; Institute for Media, Policy and Civil Society, p.6; Hazell, 1989, p.209). John Reid (2000, p.7), Canada's Information Commissioner, who is responsible for overseeing the administration of the federal Access to Information Act, writes to this effect:

> "There is a need for concerted, mandatory education about information law and policy...throughout the public service, including senior and middle-level managers, ministerial staff and line employees as well as ATI officers."

Educating the province's civil service in this matter may well be something the Review Committee may want to recommend to government. However, this focus on civil servants involved in the process of providing access to information may be somewhat of a red herring, distracting attention away from a more important focus of change, the politicians themselves. After all, civil servants' fear of reprisals may be quite real if the politicians in whose name they act are themselves uncomfortable with revealing information and/or if the civil servants are not protected from undue influence from these politicians. No amount of education will change this. Hazell (1989, p. 209) writes:

> "Ministerial sensitivities have ... made the Canadian civil servants nervous; it is not the bureaucracy, but the politicians who are the main obstacle to change in Canada."

Access to information must come to be seen by politicians as a fundamental tool of democracy, not as means of undue public pressure that could disadvantage their party. John Reid recounts an example of leadership in this regard:

> "...after I had been confirmed as Information Commissioner, I met with the former Commissioner, John Grace, to get his advice. One thing he said struck me in particular; he said that in his seven years as Privacy Commissioner and eight years as Information Commissioner (a total of 15 years spent reviewing the records which government wanted to withhold from Canadians) he hadn't seen a really good secret. My experience is much the same over the first year of my term. For the most part, officials love secrecy because it is a tool of power and control, not because the information they hold is particularly sensitive by nature.
>
> ...I wondered aloud why a Minister of Justice hadn't yet taken the approach adopted by Janet Reno, [the former] U.S. Attorney General. Ms. Reno instructed her lawyers to adopted a radical change of attitude and to find reasons to disclose information rather than the reverse. Janet Reno adopted the simple motto "maximize disclosure". (Reid, 1999, p.1).

Our main point is that we do look hopefully to Reid's example of Janet Reno's leadership in encouraging disclosure. We hope that Newfoundland can lead the way in Canada by cultivating political leadership that is prepared to champion the issue of openness, particularly as it relates to access to information.

In order to give credit where it is due, we note that on the provincial level, Newfoundland was one of the first provincial governments to introduce freedom of information legislation in 1981 under the Peckford Administration. But today, twenty years later, we hope that one of the recommendations this Review Committee will submit to the government will be that all members of the House of Assembly undergo orientation to freedom of information. Ideally, the committee can craft recommendations that build on the current spontaneous political leadership on this issue.

Relaxing the Fear: Checks and Balances in the Civil Service

Notwithstanding the above focus on politicians, the civil service may yet be an appropriate locus for change in the way in which the government responds to requests for information. Reid (2000, p. 5; 1999a) believes that the access to information legislation has altered the doctrine of ministerial responsibility so that in fact a greater onus is now placed on the civil servants:

> Now, since documents are available, one can find out where, when, why and by whom decisions were made throughout the civil service. Consequently, civil servants are now accountable for decisions they make under their own authority where before it was the Minister who had to take responsibility. Of course, the Minister still must take overall responsibility for actions taken (or not taken) by his Department but he no longer takes personal or direct responsibility for all actions taken by Departmental employees. (Reid, 2000, p. 5)

As a complement to educating senior government officials on FOI issues so that they act in full knowledge and confidence when it comes to responding to requests for information, Reid proposes a further partial remedy. He proposes giving further autonomy or independence to the civil servants responsible for administering requests for information by making them accountable to a department, say Treasury Board, other than the one for which they are responsible. This way they have less reason to fear reprisals when they do grant information. This other department, like Treasury Board, can serve as a "protective, supportive home base". Reid (2000, p. 6) compares this structure to that devised for Justice lawyers working in the various government departments. At the federal level, Justice lawyers are physically located in, and are part of, the structure of the various departments and agencies which are their clients and to whom they give legal advice. But, ultimately, they report to and are accountable to their Department of Justice superiors and the Minister of Justice.

Note that these "access coordinators" as they are called would be distinct from the staff of the Information Commissioner and, according to Reid (1999b, p. 6), should not report to the Commission because of "the potential for conflict of interest". In Reid's proposed model, while the access coordinators should report to an outside department, they should nonetheless have direct access to the senior bureaucrats in the department in which they work, be classified in the management category and thus be included in the senior level discussions of the department's management committee. Only then will "...ministers have the assurance of dedicated committed access coordinators.." who are "..carefully nurtured, heeded and protected by the most senior departmental officials..". (Reid, 1999b, p. 6)

Of course, to the degree that the freedom of information legislation in question is weak, and full of exceptions, the question of procedural openness among civil servants becomes moot. If all the background information on policy decisions, and all commissioned policy studies and reports, are considered off limits, and listed as exceptions in the freedom of information legislation, then re-educating the civil servants won't help much, nor will structuring the governmental apparatus in such a way as to protect and support them. These measures may help, however, in the case of requests for factual documents such as water quality reports.

The Appeals Mechanisms

The Institute for Media, Policy and Civil Society (p.7) has developed a list of "features of a society in which ATI legislation can be expected to thrive and even flourish". One of these features is an independent judiciary.

> "Although it is best that most requests for information are responded to positively, there must be a provision for refusing access. In such cases there must be a right of appeal. This requires a tribunal which is independent and willing to make decisions that may be unpopular with government."

On this subject, Hazell (1989, p. 195), in turn, writes:

> It is the existence of the right of appeal which makes the right of access effective. There are basically three kinds of appeal: to the courts; to an ombudsman or ombudsman-type commissioner; or to a specialist tribunal. The model chosen is a major factor in determining public confidence in the legislation; in developing the confidence of ministers and officials; in helping to change bureaucratic attitudes; and in shaping the legislation through the making of case-law.

> Most countries have a two-tier system of appeal....In neither system have the courts been a success.

> The alternatives to the courts are the ombudsman or an ombudsman-type commissioner; or some form of tribunal. In New Zealand review is by the ombudsman, in Canada by a specialist commissioner. Québec has a tribunal (i.e. a 5-member commission).... The essential difference is that while an ombudsman or commissioner can only recommend disclosure, the tribunals in Australia and Québec can order release of the documents. An exception is the new commissioner in Ontario, who also has power to order disclosure.
>
> A tribunal is cheaper, faster and more expert than the courts; and it is better suited to hearing legal argument and developing good case-law than an ombudsman or commissioner (parentheses mine).

Note that in Québec's case, the commissioners have an adjudication function, a surveillance and control function, as well as an advisory function. The commissioners must be appointed by 2/3 of the national assembly, a criteria that, it is claimed, promotes "neutrality vis-à-vis the executive power" (Commission d'accès à l'information du Québec, 1997, p.11, our translation).

It is important to specify that all national governments with FOI legislation have included therein the right of the government to veto the appeal or review process or decisions that grow from it (Hazel, 1989, p. 196).

In its earlier forms, Newfoundland's FOI legislation provided for a first stage appeal through an ombudsman who would make a recommendation subsequent to a review of the request and the reasons for its refusal; as well as a second stage of recourse, through the trial division of the Supreme Court of Newfoundland (Rowat, 1983, p. 100). Unfortunately, this provision was done away with; and Newfoundlanders and Labradorians no longer have an ombudsman to whom they can turn when they are thwarted in their attempts to access information by virtue of the Freedom of Information Act. (Note, parenthetically, that Newfoundland's legislation does not accord an ultimate veto to the government).

The current practice of obliging complainants to bring their appeals directly to the trial division of the court system seems, if not intimidating to the average citizen, at least onerous and costly, even for professional journalists and opposition members of the legislature. We, therefore, urge the review committee to take into consideration the aforementioned advantages of a model of appeals that incorporates commissioner(s) of information and tribunals.

Leadership in the Role of a Commissioner of Information

In the absence of, or as a complement to, political leadership in the arena of freedom to information, some advocates of greater access look for leadership in the person of a commissioner of information, or the ombudsman. Roberts (1999, p. 446) writes about this leadership role:

> There are important steps that can be taken under existing law by information commissioners and non-governmental organizations that will promote compliance with existing laws and policies and encourage governments to revise those laws and policies. An enhancement of FOI rights depends largely on the willingness of commissioners and non-governmental organizations to use current statutes creatively and aggressively.

John Reid challenged actions of the federal government at the Federal Court. Apparently, the federal government skirted its own FOI legislation that explicitly stated that "discussion papers" could not be excluded from public access; by Reid's report, the government integrated "discussions papers" into memoranda to cabinet and renamed these policy discussions the "analysis section" so as to shield them from the provisions of the access legislation (McIntosh, 1999, p.1; Reid, 1999b; Reid, 2000). We include this consideration of leadership qualities in case the government decides to re-introduce, and give effect in practice to, the commissioner or ombudsman model.

The Issue of Exemptions to the Access Right

This bring us to the question of exemptions, that is to say, categories of information that the legislation excludes from access. Most freedom of information legislation excludes from access any document that contains analyses of problems or policy options that is presented to Cabinet for consideration in making decisions. This means that all reports and studies prepared for government are withheld from the public until the government is prepared to release them. The federal Access to Information Act stipulates that the documents must be publicly accessible once a decision regarding that problem or policy issue has been made or, if a decision has not been made public, four years after the decision is made (Reid, 2000, p. 4). One of the problems with this is who is to know whether a decision has been made, if that decision has not been made public? And, what if the government decides to take ten years to make a decision? Does not the report or study for which the citizens have paid, once made public, give that very public the arguments with which to urge the government to take action on the issue in question?

We recommend that the Review Committee urge the government to alter the legislation so that studies which are announced as part of government's decision-making process or generally understood to be 'public', involving external stakeholders, should be made public, especially if sought under a FOI request. It might be possible to limit the exception rule by stating that unless directed by the Cabinet at the outset, any and all studies will be released. Alternately, only studies specifically requested by Cabinet to assist it in its decision-making process should be protected. This would leave all department and ministerial reports available to the public with the exception of any dealing exclusively with personal information and the business affairs of companies.

Conclusion

In his 1989 analysis of freedom of information legislation in Australia, Canada and New Zealand, Hazell (1989, p. 190) described the FOI laws of Québec, Ontario and Victoria as "highly sophisticated" and the FOI laws of Nova Scotia, New Brunswick and Newfoundland (which were enacted earlier) as "rather simpler models". We believe that twenty years after Newfoundland showed progressive leadership as one of the first Canadian provinces to adopt FOI legislation, it is time for a greater degree of sophistication. This greater sophistication should be manifested not only in the provisions of the legislation itself, but also the creation of an infrastructure to support that legislation and, finally, in a culture of openness among politicians and civil servants.

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10. The Telegram

PRESENTATION BY THE TELEGRAM
to the
FREEDOM OF INFORMATION REVIEW COMMITTEE

MARCH 22, 2001

I'm Russell Wangersky, the assignment editor with The Telegram, and a Freedom of Information user for the last 15 years.

I have filed hundreds of requests to virtually every department of government, and have received many different responses.

In that time, I've seen the good, the bad and the ugly. And the responses vary, depending on the personal vision of the cabinet minister the information was requested from.

Imagine if the police pulled you over, asked you to tell them honestly how many times you had been speeding in the last year, and then told you they'd give you a ticket for each violation you disclosed.

Suppose there was a law requiring you to comply with their request, but no one would ever know - except yourself - that you had broken it.

What would you do?

That's the horrible position that we put provincial cabinet ministers in with the present FOI legislation.

It's a simple equation, really. We are asking someone to release information that could directly affect their ability to keep their job.

How can an interested party make an unbiased decision about what information should be released?

It is unfair to even expect that they could.

And it is a horrendous conflict of interest.

And that says a lot about the current FOI Act.

Ministers have to decide whether to release information that could damage their party or themselves - and if they block the release of that information, there is no effective route of appeal.

The act needs fundamental changes in its administration.

In one way, at least, there is a lot to be learned from the federal process, where government departments have a designated ATIP officer who handles the request throughout the process.

And that's where the most important change could be made in this province.

There have to be officials who handle requests independent of the political process, and there has to be an independent commissioner to handle appeals of FOI decisions. The commissioner need not be a full-time position; some jurisdictions, like Saskatchewan, handle the process with a part-time commissioner.

The commissioner would be able to reassure FOI users that their requests were being answered fairly, promptly and without being hit by outrageous fees.

The commissioner would be able to assure users that government officials were not hiding behind statutory exemptions to withhold information improperly, and user could be satisfied that their requests got a fair and impartial hearing.

Here are a few other issues in point form;

1) federal access legislation allows for an independent commissioner to take over the legal actions required to obtain the release of documents.

2) The definition of what constitutes a "cabinet document" - subsections of section 9 - should be reviewed and tightened, to ensure that documents aren't warehoused into cabinet secrets.

3) Section 11 (b) should be clarified - the current section has been used to exclude documents that "may at some time in the future become the subject of an investigation."

4) In the Regulations, Section 16, the schedule listing the "boards, commissions or other bodies" that the cabinet can add or remove from the Act should be added to the legislation proper, so that the Cabinet cannot arbitrarily remove such agencies from the schedule. The best example of that situation is Newfoundland Hydro, which was exempted during the privatization process, and then never replaced in the schedule.

5) The treatment of requests should be handled with the view of the primacy put forward in the preamble - that requestors have a right to all information, with only specific and limited exemptions. Right now, requests are first forwarded to the department of justice, where a lawyer provides an opinion on the grounds for both releasing and withholding the information - the cabinet minister responsible then chooses whichever he or she likes.

6) The question of the protection of corporate information should also be examined - there are legitimate reasons for withholding corporate information, but blanket exemptions should not be the device used. For example, Newfoundland Hydro is exempt for corporate reasons, even though it is a virtually monopoly owned by the taxpayer. Why shouldn't taxpayers have access to information about the way the company does its business?

There's also the question about companies that accept public funds; the government has argued in the past that companies should not have to disclose the fact that they have received loans from government bodies, because the release of such information might make their bankers nervous. But shouldn't the investors - the taxpayer again - be able to establish just what they have invested in? The federal government makes the public release of funding information a condition of government loans - why shouldn't we do the same?

7) Time limits - Section 7 of the Act is very specific - it indicates that "Within 30 days of the receipt of a request a head shall in writing grant, deny or under subsection 8 (3) refer the request." This section is consistently abused; the government has interpreted this section to mean that they have to issue a reply letter within 30 days, saying they have received the request. In a majority of cases, even that guideline is not met. And it's clearly not the intent of the act.

Thank you very much for your time.
If you have any questions, I am always available.

caj The Canadian Association of Journalists
L'Association Canadienne des Journalistes

March 21, 2001
Barb Sweet
President
Newfoundland and Labrador Chapter
105 Bond Street
St. John's, NF
A1C 1T3

Joan Dawe
Chairman
Freedom of Information Review Committee
2nd floor, Beothuck Building
20 Crosbie Place
St. John's, NF
A1B 3Y8

Ms. Dawe:

On behalf of the Newfoundland and Labrador Chapter of the Canadian Association of Journalists, I would like to endorse the comments of Russell Wangersky of The Telegram in his presentation to your committee.
Our organization would like it noted that we share the same views as Mr. Wangersky of what changes are needed to the Freedom of Information Act and that it is imperative that the legislation be overhauled.

Thank You

Barb Sweet

Barb Sweet
President, Newfoundland and Labrador Chapter CAJ